80-231

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

STATE OF INDIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys
Department of Justice
Washington, D.C. 20530

(202) 633-2217

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STATE OF INDIANA, ET AL.**

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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

The principal regulatory and enforcement provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*,

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

are contained in Title V of the statute, 30 U.S.C. (Supp. I) 1251-1279. Among the more important provisions in Title V are those dealing with surface mining on prime farmlands, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the designation of certain lands as unsuitable for surface mining, and the pre-mining administrative review of proposed post-mining land uses. The questions presented in this case are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution.

2. Whether the same provisions violate the Tenth Amendment.

3. Whether the "prime farmland" and approximate original contour provisions in Title V of the Surface Mining Act violate the Due Process Clause of the Fifth Amendment because they are arbitrary and capricious or impermissibly discriminate among coal mine operators in different states.

4. Whether the provisions in Title V concerning the reclamation of prime farmlands after surface mining and the designation of certain lands as unsuitable for surface mining take private property without just compensation in violation of the Fifth Amendment.

5. Whether Section 518(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1268(c), violates the Due Process Clause of the Fifth Amendment by requiring that proposed civil penalties be paid into an interest-bearing escrow account before full administrative review of such proposed penalties may be obtained.

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OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-44a) is not yet reported.

JURISDICTION

The final order and judgment of the district court (App. B, *infra*, 45a-49a) was entered on June 10, 1980. The Secretary of the Interior filed a notice of appeal to this Court on June 16, 1980 (App. C, *infra*, 50a-51a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution, the Fifth and Tenth Amendments to the Constitution, and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in App. F, *infra*, 55a-68a.

STATEMENT

1. Like *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), pending on appeal, Nos. 79-1538, 79-1567, and 79-1596, and *Star Coal Co.* v. *Andrus*, No. 79-171-2 (S.D. Iowa Feb. 13, 1980), pending on appeal, No. 80-49, this case involves a broad constitutional challenge to numerous important provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.* Because of geographical differences between Virginia and Indiana and the resulting differences in the methods and effects of surface coal mining operations in the two

states, many of the specific provisions attacked in the present case are different from the "steep slope" provisions that were the primary focus of plaintiffs' complaint in *Virginia Surface Mining*. Plaintiffs' legal theories in the two cases are virtually identical, however.

The basic structure of the Surface Mining Act is described in 79-1538 J.S. 3-7.[1] The specific provisions of the Act challenged by the State of Indiana and the other plaintiffs below are listed in the district court's opinion (App. A, *infra*, 3a-5a). For present purposes, the following brief description of the challenged provisions should suffice.

First, plaintiffs attack several sections of the Act known collectively as the "prime farmland" provisions. These sections establish certain special requirements for surface mining operations that are to be conducted on land that qualifies as prime farmland under a definition promulgated by the Secretary of Agriculture. See Section 701(20) of the Act, 30 U.S.C. (Supp. I) 1291(20). For example, Section 510(d)(1) of the Act provides that an application for a surface mining permit on prime farmland is to be granted only if the mine operator can demonstrate his technological capability to restore mined land to an equivalent or improved prime farmland use and to meet the soil reconstruction standards for prime farmland set forth in Section 515(b)(7). 30 U.S.C. (Supp. I) 1260(d)(1), 1265(b)(7). Furthermore, Section 519(c)(2) provides that, upon the completion of mining activities on prime farmland, a mine operator's performance bond will be released only when soil productivity "has returned to equiva-

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[1] A copy of the jurisdictional statement in No. 79-1538 has been sent to appellees.

lent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices * * *." 30 U.S.C. (Supp. I) 1269 (c)(2).

In addition to the prime farmland provisions, plaintiffs challenge a variety of more general sections in the Act applicable uniformly throughout the country. These include Section 515(b)(3)'s requirement that mined land be restored to its approximate original contour and the command in Section 515(b)(5) that surface mine operators remove topsoil separately during mining activities and preserve it for use during reclamation if it is not to be replaced immediately on the backfill area of the mining cut. 30 U.S.C. (Supp. I) 1265(b)(3), (5). Plaintiffs object generally to the provisions in Section 508 of the Act that require applicants for surface mining permits to include in their application proposed reclamation plans specifying the intended post-mining use for the land involved and the method by which that use will be achieved. 30 U.S.C. (Supp. I) 1258. Plaintiffs also complain about Section 522 of the statute, which requires states that wish to assume primary regulatory authority over surface mining operations within their borders to establish and implement a planning and administrative review procedure for determining whether particular lands are unsuitable for some or all kinds of surface mining. 30 U.S.C. (Supp. I) 1272(a), (c), (d).[2] Like the plaintiffs in *Virginia*

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[2] With the exception of Georgia, Alaska, and Washington, all states in which surface coal mining is conducted have submitted to the Secretary of the Interior proposed state programs under which the states wish to assume primary regulatory authority over surface mining operations, in accordance with Section 503 of the Act. 30 U.S.C. (Supp. I)

Surface Mining, plaintiffs here object specifically to Section 522(e)(4) and (5)'s general injunction against surface mining within 100 feet of roadways and cemeteries or within 300 feet of public buildings, schools, churches, public parks, or occupied dwellings. 30 U.S.C. (Supp. I) 1272(e)(4) and (5); see 79-1538 J.S. at 11 & n.7.

Finally, like the plaintiffs in *Virginia Surface Mining* and *Star Coal*, plaintiffs in the present case challenge the Surface Mining Act's procedure for collecting proposed civil penalties. Under Section 518(c) of the Act, a mine operator seeking full administrative review of a proposed civil penalty assessed as the result of an alleged violation of the Act must first deposit the amount of the proposed penalty into an interest-bearing escrow account. If it is determined during the ensuing administrative review procedure that the operator is not liable for some or all of the assessed penalty, the overpaid amount is returned to the operator with interest. 30 U.S.C. (Supp. I) 1268(c).

2. The present case comprises two companion suits, consolidated for all purposes. Both were filed in August 1978, the first by the State of Indiana and several of its officials, and the second by the Indiana Coal Association, coal mine operators, and others. Plaintiffs contended: (1) that all the substantive statutory provisions described above (*i.e.*, all the provisions mentioned with the exception of Section 518(c)) are beyond the scope of the congressional power to regulate interstate commerce un-

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1253. The Secretary has not yet acted on most of the proposed state programs, including that submitted by Indiana. Accordingly, the interim regulatory phase of the Act is still in effect in Indiana.

der Article I, Section 8, of the Constitution; (2) that the same provisions violate the Tenth Amendment because they regulate land uses, thereby usurping an "integral governmental function" traditionally reserved to and performed by the states; (3) that the provisions of the Act dealing with reclamation of prime farmlands and restoration of mined lands to their "approximate original contour" violate the substantive due process and equal protection guarantees of the Fifth Amendment because they impermissibly discriminate among mine operators in different states; (4) that the prime farmland provisions of the Act and Section 522's provisions regarding the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment; and (5) that the requirement of depositing proposed civil penalties into escrow violates due process.[3]

In due course, a hearing was held on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss, and pursuant to a stipulation of the parties, the district court ultimately decided the case on the merits without taking further evidence. On June 10, 1980, the court issued an order (App. B, *infra*) and opinion (App. A, *infra*) sustaining plaintiffs' principal challenges to the Act.[4]

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[3] Other issues raised in the complaint dealing with the Fourth Amendment (inspections without warrants), the reclamation fee established by Title IV of the Act, civil penalties, and the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, were voluntarily dismissed during the litigation.

[4] We note that the court's opinion consists of "Findings of Fact and Conclusions of Law" adopted *verbatim* from the proposal submitted by plaintiffs.

The court adopted plaintiffs' argument that various sections of Title V of the Act exceed Congress' power under the Commerce Clause (App. A, *infra*, 12a-19a), and held that, in any event, the same provisions of the Act violate the reserved rights of the states under the Tenth Amendment (*id.* at 36a). In particular, the court ruled that the portions of the Act dealing with prime farmlands, restoration of mined lands to the "approximate original contour," replacing topsoil, and postmining land uses are unconstitutional and their enforcement was permanently enjoined (App. B, *infra*, 46a-48a). The district court also concluded that the approximate original contour and prime farmland provisions of the Act violate the Due Process Clause of the Fifth Amendment (App. A, *infra*, 37a-39a). Furthermore, the requirement of restoring the land to equivalent levels of productivity was held to offend the Just Compensation Clause of the Fifth Amendment (*id.* at 40a-42a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, which prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling,[5] and establishes procedures for designating lands unsuitable for surface coal mining (App. A, *infra*, 40a-

[5] Section 522(e)(5) provides that the prohibition of surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner. Similarly, Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways. Furthermore, the prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. 44 Fed. Reg. 15342 (1979) (to be codified in 30 C.F.R. 761.3).

42a). Finally, the court struck down as offending procedural due process Section 518(c) of the Act, 30 U.S.C. (Supp. I) 1268(c), which requires persons charged with a violation of the Act to deposit the proposed penalty into escrow (App. A, *infra*, 43a-44a). The judgment entered the same day permanently enjoined enforcement of all the foregoing provisions (App. B, *infra*).

The Secretary filed a notice of appeal to this Court on June 16, 1980 (App. C, *infra*). On June 25, 1980 the district court denied our motion for a stay pending appeal (App. D, *infra*). On July 2, 1980, Mr. Justice Stevens entered an order staying the district court's order pending final disposition of this appeal (App. E, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

The district court's final judgment declared numerous important provisions of the Surface Mining Act unconstitutional and enjoined the Secretary from taking any action to enforce these provisions against surface coal mining operations in the State of Indiana. The district court's far-reaching decision effectively nullified the Surface Mining Act in Indiana. Unless the decision below is reversed by this Court, it will deal a severe blow to the congressional effort to promote interstate commerce and to protect the environment and public health and safety through the effective regulation of surface coal mining.

1. The district court's rulings insofar as they invoke the Tenth Amendment and the Just Compensation Clause of the Fifth Amendment are essentially identical to the decision in *Virginia Surface Mining*. The deficiencies in the court's analysis in this regard have been outlined in the Secretary's Jurisdictional Statement in *Virginia Surface Mining*, 79-1538 J.S.

16-24, and the constitutional questions remain substantial for the reasons stated there. In addition, it is appropriate to observe that this Court has already rejected a Tenth Amendment argument like that adopted by the district courts in the present case and in *Virginia Surface Mining*. Appellees in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), argued that the Price-Anderson Act's limitation on liability arising from a nuclear accident violated the Tenth Amendment because it encroached on "the right of the state to protect its own property and its interest in protecting the lives and dwellings of its inhabitants * * *." 77-262 Appellees' Br. 35. The Court summarily disposed of this contention in a footnote, saying that "[n]othing in *National League of Cities* [v. *Usery*, 426 U.S. 833 (1976),] or in our prior due process cases provides any support for this claim" (438 U.S. at 84 n.27). The district court's invalidation of the Surface Mining Act on Tenth Amendment grounds is similarly unsupportable.

2. The district court's procedural due process ruling with respect to the constitutionality of Section 518(c) of the Surface Mining Act is indistinguishable from the earlier district court decisions on which the present opinion relies, *i.e.*, *Virginia Surface Mining* and *Star Coal*. The correctness of those earlier decisions is now the subject of the Secretary's appeal to this Court in No. 79-1538 and No. 80-49. The civil penalty provisions in Section 518 of the Surface Mining Act are critical to the effective enforcement of the Act's regulatory provisions, and, for the reasons stated in 79-1538 J.S. 31-34, the prepayment feature of those provisions does not violate the Due Process Clause. The district court therefore erred

in ruling Section 518 unconstitutional and enjoining its enforcement.

3. The district court ruled that approximately 20 different subsections in Title V of the Surface Mining Act are unconstitutional because they exceed Congress' power under the Commerce Clause in Article I, Section 8, of the Constitution (App. A, *infra*, 17a-19a). The primary basis of the court's ruling was its finding that surface coal mining operations on prime farmland in Indiana will have a "trivial impact on interstate commerce" (App. A, *infra*, 12a). In addition, the district court concluded (App. A, *infra*, 18a-19a) that the "approximate original contour" provision (Section 515(b)(3), 30 U.S.C. (Supp. I) 1265(b)(3)), the topsoil preservation requirement (Section 515(b)(5), 30 U.S.C. (Supp. I) 1265(b)(5)), and the provisions dealing with the designation of certain areas as unsuitable for surface mining (Sections 522(a), (c), (d) and (e)(4) and (5), 30 U.S.C. (Supp. I) 1272(a), (c), (d), and (e)(4) and (5)) are not directed at the alleviation of water or air pollution (even assuming surface mining may produce such consequences), and in any event, are not means "reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce" (App. A, *infra*, 17a).

The district court's reasoning is seriously flawed. First, the finding that surface coal mining operations in Indiana will have a "trivial impact on interstate commerce" is beside the point. At least since *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942), and *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 648 (1944), it is the *cumulative potential* effect of uncontrolled surface mining on prime farmlands throughout the Nation that must be considered. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301

(1964). Further, there is no ground for faulting the congressional judgment that poorly regulated surface coal mining may imperil substantial amounts of agricultural acreage in many states and that this, in turn, will affect interstate commerce in agricultural products. Such congressional judgments as to adverse consequences for interstate commerce are entitled to deference if there is any rational basis for them. *Id.* at 303-304. Here, there is surely a rational basis for concluding that the cumulative effects of uncontrolled surface coal mining on prime farmlands will have significant impact on interstate commerce.[6] The provisions dealing with approximate original contour, topsoil handling, postmining land use, and related matters are rational means of accomplishing one of the Act's primary goals: the reclamation of mined lands to a productive condition that will not contribute to environmental deterioration. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 93 (1977). Even assuming that, in a particular situation involving a particular piece of land and the application of a particular statutory provision, some serious constitutional question might be presented under the Surface Mining Act, that is no justification for a wholesale invalidation of numerous critical statutory sections on Commerce Clause grounds.

4. The district court also ruled that the Act's prime farmland provisions and the provision requiring restoration to approximate original contour, Section 515(b)(3), 30 U.S.C. (Supp. I) 1265(b)(3), violate the substantive due process and equal protection guarantees of the Fifth Amendment (App. A, *infra*, 37a-39a). According to the court, the lack of

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[6] See, *e.g.*, 123 Cong. Rec. 15720 (1977) (remarks of Sen. Percy).

variance procedures applicable to the prime farmland provisions and the limitation of permissible variances from the approximate original contour requirement in Section 515(b)(3) to mining on mountaintops and steep slopes impermissibly discriminate against operators and states in the Midwest, where there are significant coal reserves located under prime farmland and few or no steep slopes or mountaintops (App. A, *infra*, 37a-38a). In addition, the court held that the prime farmland and approximate original contour provisions themselves are so "irrational, arbitrary and capricious" that they "constitute a deprivation of substantive due process in violation of the Fifth Amendment" (*id.* at 39a).

We challenge that conclusion. Economic legislation such as the Surface Mining Act carries with it a presumption of rationality which can only be overcome by a showing of arbitrariness or irrationality. *Duke Power Co.* v. *Carolina Environmental Study Group, supra*, 438 U.S. at 83; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). One who would establish that such a congressional enactment is arbitrary or irrational bears an extremely heavy burden. *Vance* v. *Bradley*, 440 U.S. 93, 97, 111 (1979). A court may not substitute its judgment for that of Congress merely because it believes that Congress was "unwise in not choosing a means more precisely related to its primary purpose." *Id.* at 109. Here, the district court's opinion provides no factual or legal basis for concluding that the provisions in question are arbitrary or irrational. The district court failed to mention, and the plaintiffs failed to present, any concrete factual situation where the prime farmland or approximate original contour provisions have been applied to a mining operation so as to cause an irrational result.

Moreover, even assuming *arguendo* that the provisions in question impose a greater burden against operators in midwestern states, that is not a sufficient basis for striking them down as unconstitutional. It is well-established that a claim of arbitrariness or irrationality cannot be founded merely upon a statute's lack of uniform geographic impact. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950); *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). As this Court explained in *Central Roig Refining* (338 U.S. at 616):

> Nor does the Commerce Clause impose requirements of geographic uniformity. * * * Congress may devise * * * a national policy with due regard for the varying and fluctuating interests of different regions. [Citations omitted.]

The short answer to plaintiffs' discrimination complaint is that the characteristics of surface mining operations vary with geography, and geographical conditions are not the same in all affected states. Congress has determined that measures appropriate for steep-slope mines are not necessarily desirable in prime farmland areas. That is surely a rational distinction for Congress to draw, and the fact that a particular state has more of one kind of mining operation than another does not establish discrimination in violation of the Due Process Clause of the Fifth Amendment.

CONCLUSION

Probable jurisdiction should be noted, and the case should be set for argument in tandem with *Virginia Surface Mining*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

AUGUST 1980

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA;
OTIS R. BOWEN, M.D., Governor of the
State of Indiana;
JOSEPH D. CLOUD, Director of the
Indiana Department of Natural Resources; and
INDIANA DEPARTMENT OF NATURAL RESOURCES,
PLAINTIFFS

vs.

CECIL D. ANDRUS, as Secretary of the
United States Department of the Interior;
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
UNITED STATES DEPARTMENT OF THE
INTERIOR; and the
UNITED STATES OF AMERICA, DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION;
MEADOWLARK FARMS, INC.;
AMAX COAL COMPANY, a divison of AMAX INC.;
PEABODY COAL COMPANY; and
JOHN A. CONLON, a resident and citizen of the
State of Indiana, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA;
THE UNITED STATES DEPARTMENT OF THE INTERIOR;
CECIL D. ANDRUS, as Secretary of the
United States Department of the Interior;
THE OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
and
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
DEFENDANTS

MEMORANDUM OF DECISION

Plaintiffs in these consolidated actions seek a judgment declaring various portions of the Surface Mining and Control Act of 1977 (the Act), 30 U.S.C. §§ 1201 to 1328, unconstitutional, as well as a permanent injunction preventing enforcement of the challenged provisions by the Secretary of the Interior. The matter came before the Court for a trial on the merits on April 24, 1980, pursuant to joint motion and procedural stipulation by the parties. Defendant's motion to dismiss, taken under advisement at that time, will be treated as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and is hereby DENIED.

Plaintiffs include AMAX, Inc., through its division AMAX Coal Company, Peabody Coal Company, and members of the Indiana Coal Association, each of whom is an owner or operator of surface coal mines within the State of Indiana, Meadowlark Farms, Inc., which owns interests in realty, some of which are coal interests which it leases to AMAX, Inc., and conducts farming operations and other activities on the reclaimed land, James A. Conlon, a resident and citizen of the State of Indiana, as well as the State

of Indiana, Otis R. Bowen, M.D., its Governor, Joseph D. Cloud, Director of the Indiana Department of Natural Resources which, pursuant to *Ind. Code* § 13-4-6-4 (1976), is responsible for supervising and enforcing the Indiana Strip Mining Reclamation Act, and the Indiana Department of Natural Resources.

Defendant Office of Surface Mining Reclamation and Enforcement, its director, Walter J. Heine, and Cecil D. Andrus, as Secretary of the Department of the Interior, are responsible for administering the Act and enforcing its provisions.

The complaints allege that the challenged provisions exceed the regulatory authority conferred upon the federal government under the Commerce Clause of the United States Constitution and are not reasonably related to the legitimate end of controlling commerce-affected environmental problems, that they are unconstitutional land use control and planning regulations violative of the Tenth Amendment, that they place disproportionate burdens upon surface mining operations, and therefore upon Indiana coal mining, which is almost exclusively of the surface mining variety, and that they constitute a taking of property without just compensation, in violation of due process and Taking Clause requirements of the Fifth Amendment. Specifically, the challenged provisions, all of which are within Title V of the Act, are:

(a) § 507(b)(16) [30 U.S.C. § 1257(b)(16)];

(b) § 701(20) [30 U.S.C. § 1291(20)];

(c) § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)];

(d) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(e) § 515(b)(7) [30 U.S.C. § 1265(b)(7)];

(f) § 515(b)(19) [30 U.S.C. § 1265(b)(19)] insofar as that portion which provides ". . . achieve the approved postmining land use plan . . .";

(g) § 515(b)(20) [30 U.S.C. § 1265(b)(20)], as to that portion which provides, "when the regulatory authority approves a long-term intensive agricultural postmining land use" and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .;", and any other part which requires any post-mining land use.

(h) § 519(c)(2) [30 U.S.C. § 1269(c)(2)], as to that portion which provides ". . . until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices";

(i) § 515(b)(3) [30 U.S.C. § 1265(b)(3)];

(j) § 515(b)(5) [30 U.S.C. § 1265(b)(5)];

(k) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)]; and

(l) § 510(b)(1) and (2) [30 U.S.C. § 1260 (b)(1) and (2)] to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or of any change in postmining land use from the premining land use.

(m) § 518(c) [30 U.S.C. § 1268(c)].

(n) § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] as to that portion "the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products . . . obtained under high levels of management;"

(o) § 519(c)(2) [30 U.S.C. § 1269(c)(2)] as to that portion which provides that a bond on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . .".

The challenged provisions constitute the heart of the Act, which was promulgated in 1977 primarily to counteract perceived adverse environmental effects of surface mining operations. *See* 30 U.S.C. § 1201(c). The legislation established a uniform set of mining and reclamation regulations to be implemented by way of conforming state enforcement programs, approval and supervision of which was made the responsibility of the newly-created Office of Surface Mining Reclamation and Enforcement. The Act is effective in two stages. From August 3, 1977 until either a state or federal program is implemented, a limited number of provisions are in effect [§§ 501-504, 30 U.S.C. §§ 1251-541.] This is commonly denoted as the interim phase, during which period the states must issue permits requiring compliance with the interim aspects of the federal Act [§ 502(a) and (b), 30 U.S.C. § 1252(a) and (b)]. Most of Title V becomes effective when either a state

program is approved or a federal program is implemented [§ 504(a), 30 U.S.C. § 1254(a)], and an operator must submit an application with reclamation plans for a permit within two months of the approval of a state program or the implementation of a federal program [§ 502(d), 30 U.S.C. § 1252 (d)]. The Secretary of the Interior has issued regulations for the interim period [republished as 30 C.F.R. §§ 710-725] pursuant to § 501(a) [30 U.S.C. § 1251(a)], and regulations for the formulation, submittal and review process of state programs, as well as for permanent aspects of the Act [30 C.F.R. §§ 700-899], pursuant to § 501(b) [30 U.S.C. § 1251 (b)].

To retain authority over the regulation of surface mining operations and other matters encompassed within the Act, the states must pass laws and regulations for and submit a state program to the Secretary of the Interior [§504, 30 U.S.C. § 1254]. The time for such submission was extended to March 3, 1980, by order of the District Court for the District of Columbia [*In Re Permanent Surface Mining Regulation Litigation*, 13 ERC 1447 and 1586 (1979)] because of the Secretary's delay in promulgating permanent regulations. A state program, including the legislation and regulations for the program, must conform to the Act and to the Secretary's regulations [§ 503(a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)]. If the state program is not approved, the Secretary must promulgate a federal program for the state. Permits and enforcement would then be accomplished by the Office of Surface Mining Reclamation and Enforcement, a part of the Department of the Interior.

The Court's jurisdiction in this case is predicated upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202. Standing exists by virtue of the fact that at least one party has standing in regard to each issue. *See California Banker's Association* v. *Schultz*, 416 U.S. 21, 44-46 (1974). Not all of the contested provisions are a part of the currently effective interim program. However, judicial determination as to the validity of various portions of the soon to be effective permanent program, with which any Indiana program must comply, will serve to clarify the extent to which the state program must conform to the Act's particularized requirements, and avoid enactment by the Indiana legislature of unnecessary laws and regulations. There can be no doubt that plaintiffs are currently aggrieved by the provisions being challenged. The Act has necessitated huge expenditures on the part of Indiana surface mine operators, and threatens to destroy Indiana's competitive position as a supplier of coal. Plaintiff AMAX Coal Company in 1978 expended approximately $27,000,000 to purchase equipment required in order to comply with the Act and incurred an additional $8,100,000 in increased operating costs for its four Indiana mines. The figures for 1979 were $6,000,000 for additional equipment and over $8,000,000 in increased operating costs. These figures do not include pollution control costs or blasting expenditures, but rather are limited to costs made necessary by the prime farmland, topsoiling, and approximate original contour requirements of the Act, challenged herein. The huge cost increases have already led AMAX to close one mine just prior to the effective date of the Act's interim program, resulting in the loss of 152 jobs and over 600,000 tons of coal production annually. *See* Plaintiff's Exhibits 9, 10, 29 and 30.

The Court has reviewed the testimony, arguments, exhibits, briefs and relevant caselaw in this cause, and has concluded that, for reasons set out more fully below, various portions of Title V of the Surface Mining Control and Reclamation Act of 1977 exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment. Accordingly, these provisions must be declared invalid. Plaintiffs have submitted what the Court considers to be a thorough yet concise statement of proposed findings of fact and conclusions of law in this matter. The Court now adopts and sets forth below as its own these findings and conclusions as required by Rule 52 of the Federal Rules of Civil Procedure. An Order and Judgment embodying the Court's conclusions herein will accompany this opinion.

I.

COMMERCE CLAUSE

(A) *Issues*:

Plaintiffs assert that provisions of Title V are attempts by Congress to regulate facets of surface coal mining operations which have no substantial adverse effect on interstate commerce, or that these provisions are not a means reasonably or plainly adapted to any legitimate end permitted by the Constitution under the Commerce Clause, that is, removing substantial adverse effects on interstate commerce.

Under these issues plaintiffs challenge "the prime farmland provisions" which encompass the following sections of Title V:

§ 507(b)(16) [30 U.S.C. § 1257(b)(16)] which requires the applicant to identify in the permit application the location of "prime farmlands" on which surface mining operations are to be conducted, pursuant to the definition of prime farmland as established by the Secretary of Agriculture pursuant to § 701(20) [30 U.S.C. § 1291 (20)];

§ 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] which requires that the reclamation plan submitted with the application include a statement concerning "the productivity of land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products from such lands obtained under high levels of management . . .;"

§ 510(d)(1) [30 U.S.C. § 1260(d)(1)] which requires that the regulatory authority, before issuing a permit farmland surface mining operations on prime farmland, shall consult with the Secretary of Agriculture, and grant a permit to mine on prime farmland only if the regulatory authority finds that the operator "has the technological capability to restore such mined area . . . to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 515(b)(7) . . .;"

§ 515(b)(7) [30 U.S.C. § 1265(b)(7)] which requires the separate removal and replacement of the A, B and C soil horizons in the instance of prime farmlands;

§ 515(b)(20) [30 U.S.C. § 1265(b)(20)] as to that portion which provides, "when the regulatory authority approves a long-term intensive

agricultural postmining land use", and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .", and any other part which requires any postmining land use;

§ 519(c)(2) [30 U.S.C. § 1269(c)(2)] which provides that the bond for mining on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices. . . ."

[Hereafter the foregoing provisions are referred to as "the prime farmland provisions."]

The plaintiffs under these issues further challenge the approximate original contour requirements of § 515(b)(3) [30 U.S.C. § 1265(b)(3)], the topsoiling requirements of § 515(b)(5) [30 U.S.C. § 1265 (b)(5)], and the areas unsuitable for surface mining provisions § 522(a), (c), (d) and (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d) and (e)(4) and (5)].

Plaintiffs also challenge those provisions of the Act which combine to require a commitment by an operator to a certain postmining land use, as well as the approval of such postmining land use by the regulatory authority as a condition to the applicant being granted a permit to mine. These provisions are: § 507(d) [30 U.S.C. § 1257(d)] which requires the submission of an acceptable reclamation plan, which must contain information regarding the premining and postmining use, as well as the productivity of land, and those which require a detailing in the plan of how the proposed postmining land

use will be achieved, as well as necessary support activities for the proposed postmining land use, all as contained in § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)]; § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)] which require that a permit application be denied unless all of the application requirements are accurate and complete and that the reclamation requirements including the land use concepts as set forth above, "can be accomplished"; and certain portions of § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)] which are respectively the "approved postmining land use plan", and 'the regulatory authority approves a long term intensive agricultural postmining land use", and "the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan. . . ."

The Court's inquiry on the question of whether Congress has properly exercised the Commerce Clause power is a very specific, limited and two-fold inquiry: First, this Court must "determine whether the particular activity [facet of surface mining operations] regulated or prohibited is within the reach of the federal power," *United States* v. *Darby*, 312 U.S. 100, 120-21 (1941), that is, whether there is a rational basis for Congress to conclude that the particular facet of surface mining operations regulated or prohibited has a substantial and adverse effect on interstate commerce. A "trival impact on commerce" may not be used by Congress "as an excuse for broad general regulation of state or private activities," *Maryland* v. *Wirtz*, 392 U.S. 183, 196 n.27 (1968). Second, "the means chosen," that is the form of regulation, must be "reasonably adapted" or "plainly

adapted" to the legitimate end of removing the substantial and adverse effect on interstate commerce. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 262 (1964), *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

(B) *Findings*:

1. Surface coal mining operations on prime farmland, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce. The extent and distribution of prime farmland in the United States was presented to Congress in the form of the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands*, prepared by Office of Management and Budget, Soil Conservation Service, Bureau of Mines, Federal Energy Administration, and the Environment Protect Agency (hereinafter the "Report"). The Report was presented with a report entitled *Restoring Soil Productivity On Surface-Mined Land*, Johnson, McCormack and Sampson (1977), which was presented to the House Committee at *Briefing Presentation By The Soil Conservation Service Before The Committee On Interior And Insular Affairs*, U.S. House of Representatives, April 5, 1977. [See 43 Fed. Reg. 41,716 (1978), Part III; Exhibit 3 to Deposition of Neil Sampson (one of the authors).]

2. The legislative history demonstrates that the Report was before Congress, which relied on the Report in enacting the Act. The House Committee Report states as follows:

> The Carter Administration has recommended that a 5-year moratorium be placed on mining on

> prime agricultural lands until studies are conducted to learn if the soil can be returned to its original productivity. . . . Furthermore, *data contained in the report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moratorium is not justified.* [H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 185 (1977); emphasis added.]

Such Congressional reliance is further shown by the fact that the data set forth in the Report, as well as that presented by Mr. Sampson, was presented to the Senate and printed in the Records. [123 Cong. Rec. S8,105 (daily ed. May 20, 1977).]

3. The Report disclosed the results of a Soil Conservation Service study conducted in 1975 to evaluate the status of the Nation's croplands in 1975 by comparison of the current land use on sample plots with the land use in 1967. It was found that the Nation contains a total of 384,000,000 acres of "prime farmland," of which 250,000,000 acres (or 65%) was used for the production of crops. [See also H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 105-06 (1977).] Approximately 134,000,000 acres of prime farmland was not in cropland use. The study disclosed that an annual average of 1,000,000 acres of prime farmland was converted to urban and water uses during the period 1967 to 1975. Of the 8,000,000 acres of prime farmland lost to such use during that period of time, 6,500,000 acres were converted to urban uses and 1,500,000 acres to water uses, or 80% and 19% respectively. [Report, p. 6, Table 5.]

4. Further studies were conducted based upon the annual production of surface coal mining in the United States in 1977 and its effect on prime farm-

land. The studies showed that approximately 21,800 acres of prime farmland were disturbed by surface mining on an annual basis. This constitutes only 2% of the 1,000,000 acres per year that is irretrievably lost to urban and water use. Further, it constitutes only *six one-thousandths* of one percent [0.006%] of the total prime farmland in the United States. It would take 166 years for surface mining to disturb 1/100 (one one-hundredth) of the total prime farmland in the United States. Therefore, it was determined that the impact of surface mining on the loss of prime farmland was negligible. The Report concluded that even if the entire 21,800 acres of prime farmland affected in 1977 came entirely out of corn production, the yearly effect based on the 1976/1977 crop year would be less than *0.04%*. In comparison, through the Agricultural Stabilization and Conservation Service, the Federal Government is paying farmers *not* to grow crops on 5,900,000 acres. [Plaintiffs' Exhibit 20.] This is 200 times the amount of prime farmland disturbed annually by surface coal mining.

5. The Report concluded that the United States has ample farmland to meet its domestic needs for the foreseeable future. The Report concluded:

> [E]ven assuming a worst case senario [sic] in which the entire 13,800 acres of prime farmland annually affected by surface mining in the Illinois, Indiana, Western Kentucky coal fields were lost permanently to farm production, total acreage losses over a 30 year period would amount to 414,000 acres. Further assuming that the entire impact of the loss would be on corn production, the total production loss in the 30th year would be less than 1% of the national 1976/1977 yields. [Report, p. 21.]

The Report also concluded:

> The United States has ample farmland to meet its domestic needs for the foreseeable future. However, there are some persons who believe that there exists an ethical responsibility to retain as much as possible the existing farmlands of this Nation. In their view there is a humaritarian aspect of this problem and they believe that every acre of prime farmland that goes out of production represents loss of food stocks which could be made available to people in less developed areas of the world. This view generally does not recognize the issues associated with getting the food from the United States to those needy in other countries, e.g., transportation costs, foreign limitations of the less developed countries, and the views of other countries exporting agricultural products. [Report, p. 6.]

6. There are 11,500,000 acres of prime farmland in Indiana. [Affidavit of Dideriksen.] The six major coal producing countries in Indiana (Sullivan, Warrick, Clay, Greene, Pike and Vermillion) produce more than 80% of Indiana's surface mineable coal [Plaintiffs' Exhibit 13], but contribute less than 5% of the annual production of corn, soybeans and wheat in Indiana [Plaintiffs' Exhibit 14]. Only 40,000 acres of prime farmland are projected to be disturbed by surface mining in Indiana in the next 20 years. [Affidavit of Smith.] That amounts to only 3/1,000 (three one-thousandths) of the total prime farmland in Indiana. Throughout all the Corn Belt States, it is projected that only 2/1,000 (two one-thousandths) of the total prime farmland within those states will be disturbed by surface mining in the next 20 years [Reference 1 to Defendants' evidence in opposition to Motion For Preliminary In-

junction]. The Agricultural Stabilization and Conservation Service paid Indiana farmers *not* to grow crops on 369,135 acres in 1977. [Plaintiffs' Exhibit 20.] Thus, the Federal Government is paying Indiana farmers not to farm nearly 1,000% more land than would be affected by surface coal mining in Indiana in the next 20 years.

7. The approximate original contour, topsoiling and prime farmland provisions of the Act are totally unrelated to the enhancement of air and water quality [Tr. 94-97; Plaintiffs' Exhibit 21]. The four identified pollutants are iron, manganese, suspended solids and acidity (pH). [Tr. 94; 30 C.F.R. § 715.17; 30 C.F.R. § 816.42.]

8. Requiring the return of prime farmland to the use of farming in postmining use would actually increase water pollution. One of the more serious problems with respect to water pollution within the State of Indiana is that of sedimentation (or suspended solids) in streams which is caused by farming. [Tr. 96.] Thus, the prime farmland provisions of the Act would increase or cause an adverse effect of surface coal mining operations on water quality.

9. The Report of the 208 Water Quality Program study and analysis [hereinafter "208 Report"] shows that active surface mining in Indiana is not causing any surface water quality problems, and that to the extent that water quality problems exist in Indiana, such problems are caused by land that was reclaimed prior to the 1967 Indiana surface mining reclamation law. [Plaintiffs' Exhibit 45; Defendants' Exhibit in Opposition to Motion for Preliminary Injunction, pp. 216-17.] The report also states that water quality aspects of Indiana mines are presently being controlled by the National Pollution Discharge and

Elimination System Standards of the Clean Water Act which are "a major factor in preventing undesirable pollutants from entering surface waters from active strip mines." [208 Report, p. 217.]

10. Plaintiffs coal companies own and/or have rights to and presently intend to mine lands subject to § 522(e)(4) and/or (5) [30 U.S.C. § 1272(e)(4) and/or (5)]. [See Plaintiffs' Exhibit 33 and deeds and/or leases and maps attached thereto.]

(C) *Conclusions*:

1. "The prime farmland provisions" are directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. Similarly, the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce. These sections, to the extent set forth, are not within powers delegated to Congress and are unlawful as being contrary to the Constitution.

2. The water pollutants are being controlled pursuant to § 515(b)(10)] [30 U.S.C. § 1265(b)(10)] of the Act, which requires minimizing disturbances to the prevailing hydrologic balance, and § 515(b)(8) [30 U.S.C. § 1265(b)(8)], which regulates the quality of discharges from permanent water impoundments. The water pollution control aspects of the Act are the requirements for settlement ponds, treatment ponds and that surface drainage or nonpoint sources be controlled, as well as point source discharges under the National Pollution Discharge Elimination System Standards of the Clean Water

Act. Thus, the Act contains entirely separate provisions dealing with water pollution control, that is, separate and apart from the original contour, prime farmland and topsoiling provisions, as well as the other provisions being challenged by plaintiffs. Additional provisions of the Act which are plainly adapted to alleviating air and water pollution are § 515(b)(4) [30 U.S.C. § 1265(b)(4)], which requires stabilization and protection of all surface areas, including spoil piles, to effectively control erosion and air and water pollution; § 515(b)(11) [30 U.S.C. § 1265(b)(11) [30 U.S.C. § 1265(b)(11)], which requires stabilization of mine wastes; § 515 (b)(14) [30 U.S.C. § 1265(b)(14)], which requires that all debris, acid-forming materials, toxic materials or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of to prevent contamination of ground and surface water; § 515(b)(16) [30 U.S.C. § 1265(b) (16)], which requires that reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with surface coal mining operations; and § 515(b)(19) [30 U.S.C. § 1265(b)(19)], which requires the establishment on all regraded areas and other lands affected of "a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area . . . and capable of self-regeneration and plant succession. . . ."

3. The approximate original contour provisions [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)], the topsoiling requirements [§ 515(b)(5), 30 U.S.C. § 1265(b) (5)], the areas unsuitable for surface mining provisions [§ 522(a), (c), (d) and (e)(4) and (5), 30

U.S.C. § 1272(a), (c), (d) and (e)(4) and (5)] are not directed at the alleviation of water or air pollution, to the extent there are such effects, and are not means reasonably and plainly adapted to removing any substantial and adverse effect on interstate commerce. These sections are outside the enumerated powers of Congress and are, therefore, unconstitutional and unlawful.

4. Those provisions of the Act which combine to require a commitment by an operator to a certain postmining land use, as well as approval of any changes in postmining land use by a regulatory authority, as a condition to the operator being granted a permit to mine, are unrelated to removing any substantial and adverse effect on interstate commerce; and further, are not means reasonably and plainly adapted to the legitimate end of removing substantial adverse effects on interstate commerce; and are, therefore, unlawful and contrary to the Constitution. These provisions are § 507(d) [30 U.S.C. § 1257 (d)], which requires the submission of an acceptable reclamation plan containing postmining land use consideration requirements as a part of the permit application; § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)], requiring that the reclamation plan must contain information regarding the premining and postmining use and productivity of the land; § 515(b)(19) and (20) [30 U.S.C. § 1265(b)(19) and (20)] to the extent set forth in "the prime farmland provisions", pertaining to approval of the postmining land use; and § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)], to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or any change in postmining land use from the premining land use.

II.

TENTH AMENDMENT

(A) *Issues*:

Plaintiffs challenge the same provisions in Title V as set forth above in Part I(A)—Commerce Clause —Issues. Plaintiffs contend these provisions when combined with those provisions of Title V which require that a State submit a State program in full conformity with the Act and the Secretary's regulations [§ 503(a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)], or that the Federal Government through the Department of the Interior and OSM will promulgate a Federal program [§ 504, 30 U.S.C. § 1254], constitute displacement, or regulation, or alteration of the operation and structure of traditional or integral governmental functions essential to the sovereignty of the States contrary to the Tenth Amendment. The plaintiffs contend that the provisions challenged are in fact land use control and planning dictates, which also require and limit State governmental structures and procedures in land use control and planning, a traditional or integral governmental function or area of the sovereignty of the States.

The plaintiffs further contend that the land use control and planning policies in these provisions will have significant adverse effects for the State of Indiana, and that since these provisions are not based upon alleviating air or water pollution, when Federal and State interests are balanced, the State interests are paramount.

On the Tenth Amendment issues asserted by the parties, it is clear that the Tenth Amendment is a

limitation upon congressional power under the Commerce Clause. *National League of Cities* v. *Usery*, 426 U.S. 833, 842-43 (1976). This Court's inquiry pursuant to *National League of Cities* is whether the provisions of the Act being attacked are (1) a congressional enactment (in the exercise of commerce clause powers) . . . to displace, regulate or significantly alter (2) the management, structure or operation of (3) a traditional or integral governmental function . . ." of the States. *Ambersbach* v. *City of Cleveland*, 598 F.2d 1033, 1035-36 (6th Cir. 1979) (footnotes omitted). In some situations a balancing of Federal and State interests may be required because the Court in *National League of Cities* left standing *Fry* v. *United States*, 421 U.S. 542 (1975). *See also National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring), where a balancing approach interpretation is made of the Court's opinion.

(B) *Findings*:

1. As a matter of land use policy and control, it is evident from a review of the area of prime farmland in the State of Indiana as defined by the Secretary of Agriculture that it is for the most part concentrated north of the surface mining coal producing areas in the southwestern Indiana. The six counties in southwestern Indiana which account for 80% of Indiana surface-mined coal account for less than 5% of the total production of agricultural commodities as corn, wheat, and soybeans in the State of Indiana [Plaintiffs' Exhibits 13 and 14]. Also to be noted is that the Agricultural Stabilization and Conservation Service in 1978 paid Indiana farmers not to produce crops on 369,135.9 acres [Plaintiffs' Exhibit 20]. What is "prime farmland" from the standpoint of land use control and planning within the State of

Indiana may well not be prime farmland as established by the Secretary of Agriculture. Moreover, as to the highest and best land use subsequent to mining of prime farmland, it could well not be farming but rather forestry [Plaintiffs' Exhibit 41], or other uses.

2. From a land use control and planning consideration, the requirement that all mined prime farmland be returned to a farm use, at least through the release of bond, will not serve to decrease the loss of prime farmland to urban and water uses. However, if surface mined prime farmland is allowed to be returned to other uses which could well occur because of the suitable time which surface mining presents for a change in the use of land [see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 94 (1977); Conclusion No. 13, *infra*], such surface mined prime farmland could be converted to industrial, residential or recreational uses and prevent other non-mined prime farmland from being converted to such uses.

3. The coal deposits in Indiana are part of what is known as the Illinois Coal Basin or Eastern Interior Coal Basin. The center of the Basin is in southeastern Illinois. Only the eastern fringe of the basin lies within Indiana. From the center of the Basin in Illinois, which is up to 1,000 feet below the surface, the coal seams rise toward the surface in Indiana. Surface mining takes place along the periphery of the Basin in Indiana. Because of their depth, the coal deposits located in Illinois near the center of the Basin cannot be mined by the surface method. [Plaintiffs' Exhibits 5 and 12.]

4. The portion of the Illinois Coal Basin lying within Indiana is located along the west central border of the State and extends southward to the

southwestern portion of the state. The major portion of such reserves is concentrated in southwest Indiana. [Plaintiffs' Exhibit 1.] Prime farmland in Indiana is dispersed throughout the State, with the major portion being in the northern and central parts of the state; only a small portion of it is in the coal area of southwestern Indiana. [Plaintiffs' Exhibits 2 and 4.] Thus, the vast majority of Indiana's prime farmland is not located coincidentally with the State's surface mineable coal reserves. Nevertheless, nearly all of plaintiffs' permit areas contain some prime farmland, some as much as 100% [Plaintiffs' Exhibits 7 and 8].

5. The major coal producing counties in Indiana are heavily dependent upon the surface coal mining industry for their financial well being, both private and public, and the delivery of their governmental services to the extent that, in one county (Warrick), over 50% of the total county revenues from personal or real property taxes is derived from the land use of the surface coal mining industry. [Plaintiffs' Exhibits 15-19.] Further, the entire Indiana electrical utility industry is inextricably tied to the land use of surface mining. The surface coal mining method accounts for 99% of Indiana's total coal production. Over 83% of Indiana's coal production is sold to Indiana public utilities under long-term coal contracts. [Plaintiffs' Exhibit 6.] Major industry has located in southwest Indiana because of the ready supply of coal, such as the Alcoa operation in Warrick County, which employs over 3,500 persons. [Plaintiffs' Exhibit 11.]

6. The Indiana coal deposits are such that it is not economical at the present time to recover the coal by the underground mining method. Illinois and

Western Kentucky coal seams are thicker and cleaner with better roof and floor conditions for underground mining. In contrast, Indiana seams are thinner, undulatory, erratic and multi-bedded with numerous shale partings. Further, Indiana has a known fault running parallel to the Wabash River with contemporaneous post depositional channels that disrupt coal seams and result in adverse roof conditions. [Plaintiffs' Exhibit 12.] Also, Indiana underground minable deposits are of insufficient size. Approximately 83.8% of the coal produced in Indiana in 1977 was sold to Indiana utilities [Plaintiffs' Exhibit 6] under long-term contracts which generally require large blocks of coal of up to 50,000,000 tons. There are no underground mineable coal deposits of that magnitude in Indiana. [Plaintiffs' Exhibit 12.]

7. The coal reserves in Illinois are significantly more conducive to underground mining methods, than are those in Indiana. While 99% of Indiana's coal is produced by surface mining, over one-half (55% or 33,000,000 tons) of Illinois' annual coal production is produced by underground mining. There is only one underground mine planned in Indiana in the future, while eight new surface mines are planned. In Illinois, however, there are plans for 21 new underground mines and only nine surface mines. [Tr. 116.]

8. With respect to the use of coal in Indiana, which is primarily by Indiana public utilities, a shift has begun from Indiana surface mined coal to Illinois underground mined coal, at least part of which shift is because of the operating costs attributable to the provisions of the Act being challenged. The current delivered cost of Indiana surface mined coal to Indiana utilities is $1.07 per million Btu. The current

delivered cost of Illinois underground mined coal to Indiana utilities is $1.08 per million Btu. [Tr. 107-10; Plaintiffs' Exhibit 37.] In 1981 it is projected that only 28% of the coal required for new coal-fired electrical generators in Indiana will come from Indiana, while 29% will come from Illinois. [Tr. 114; Plaintiffs' Exhibit 38.] The remainder will come from other States, as Kentucky.

9. Thus, the express intent of the Act [see Conclusions, *infra*] to shift surface coal mining operations into underground coal mining operations will be achieved, and surface coal mining land use will probably shift from the State of Indiana into underground mining in Illinois and/or Kentucky. [Tr. 113-14.] As shown by U.S. Department of Energy projections, this shift has already begun [Plaintiffs' Exhibit 38]. These results are even more certain when Findings Nos. 1 and 2, Part IV(A) are considered.

10. Prior to the enactment of the Act, the Indiana Department of Natural Resources, Division of Reclamation had a total staff of approximately nine employees and an annual budget of approximately $236,578. In order to comply with the interim phase requirements of the Act and federal regulations, the State of Indiana was forced to increase the staff and budget of the Division to 29 employees and $587,063 respectively [Plaintiffs' Exhibit 22].

(C) *Conclusions*:

1. The Act [§ 503, 30 U.S.C. § 1253] requires that the States submit a State program conforming with "the requirements of this Act" and "regulations issued by the Secretary pursuant to this Act" [§ 503 (a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)],

which program must be approved by the Secretary, or else the Federal Government will promulgate a program for the State [§ 504(a), 30 U.S.C. § 1254(a)]. This Court must view the portions of the Act challenged by the plaintiffs as if the Federal Government were going to administer the Act under a Federal program in Indiana, for if sovereign functions of a State are dictated and confined by the Act under threat of a Federal program, it is not relevant that a State may ultimately "choose" under threat of Federal usurpation of a sovereign function to have a State program, make such decisions, and structure its government accordingly. If the Federal Government does not have the power to directly usurp functions and control the areas of the Act being challenged, then it is equally without the power to indirectly require such to be done by the States under the threat of Federal usurpation. If these provisions are "incapable of standing by themselves, then the provisions of the Act must fall." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-86 (1937); *National League of Cities*, *supra*. The fact that certain of the decisions might be made by the States under a State program is not sufficient. A State program must comport fully with the Act and regulations which contain inherent Federal decisions already made and which require that the States adopt certain governmental structures and procedures, or else have a Federal program. These considerations are apparent on the face of the Indiana Act passed to authorize the executive branch to submit an Indiana program, where the General Assembly [IC 13-4.1-1 *et seq.*] expressed the following:

> Sec. 1. The general assembly finds that:
>
> (1) P.L. 95-87, the federal Surface Mining Control and Reclamation Act of 1977, provides

that the federal government will assume control of the regulation of the surface coal mining operations and reclamation procedures within Indiana unless the state of Indiana enacts laws as specified by the federal act.

(2) The federal act in many parts constitutes an intrusion into land use planning and control, an integral and traditional aspect of the sovereignty of the state of Indiana, its people, and political subdivisions, as well as numerous other state and local governmental functions as reserved to them by the Tenth Amendment of the Constitution of the United States.

* * *

(4) The threat that the federal government will regulate the surface coal mining operations and reclamation procedures, including land use planning and control, if the state of Indiana does not enact the necessary legislation for a state program, is coercive. It makes the overriding consideration whether to prevent further federal encroachment upon and regulation and control of the state, its people, and local industry, rather than what is in the best interest of the people of the state of Indiana, considering local employment opportunities, financing of local government, and the use of local and state natural resources with consideration for the geography and terrain of the area.

(5) The state of Indiana has challenged the federal act in a lawsuit presently pending before the United States District Court for the Southern District of Indiana, Indianapolis Division, entitled . . . .

2. Regardless of whether the required Federal land use policies, the required governmental structures, and the required procedures for implementing

land use control and planning policy decisions under the Act are instituted in Indiana through a federally mandated and confined State program or through a Federal program, the issues are the same. Even if a State program is instituted in Indiana, the Federal Government cannot do indirectly that which is unconstitutional to accomplish directly. In *National League of Cities*, had the Federal Government not legislated that the States pay certain minimum wages to employees which *indirectly* altered the States' choices as to the delivery of certain governmental services to their citizens, but attempted to directly usurp the delivery of these governmental services, it would have been an even clearer violation of the Tenth Amendment. If Indiana does submit a State program, it will have to comport fully with both the Act and the Secretary's regulations, which contain explicit and implicit federal land use control and planning policies and decisions, as well as required State governmental structures and procedures for further land use decisions. This constitutes Federal regulation of the States as States as under *National League of Cities*. If there is no State program, then the Federal Government will directly usurp the functions which would be an even clearer violation of the Tenth Amendment than that which was prohibited in *National League of Cities*.

3. Land use control and planning is a traditional or integral governmental function or area of State sovereignty. This is required because of the very diverse geography, climate, natural resources, population density and economic structures within the various States, and this was expressly recognized by Congress in § 101(f) [30 U.S.C. § 1201(f)] of the Act. Land use control and regulation has historically

always been exercised by State governments. Land use planning and control through zoning laws and their provisions "are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975). It is one of the most severe and restrictive governmental powers, considering its effect on individuals' property and on local governments as cities, counties and States. Land use planning and control most directly affect the people, industry and governmental entities directly connected with the land involved. In many situations it is the presumed local benefit-burden to the land owner and community in question which prevents a Fifth Amendment violation. The broader the public interest which defines that to be protected and the broader the constituency to which public officials must answer, the more diluted and nonexistent are the local "benefits and burdens" on which the use restrictions are legally based. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 133 (1978).

4. The "prime farmland" provisions combine to have prime farmland defined by regulations of the Secretary of Agriculture, with an applicant's permit being conditioned upon a commitment to a postmining farm use, and require a postmining farm use at least until the release of the bond, which will not be released until productivity has reached equivalent levels of yield as non-mined prime farmland in the surrounding area under similar levels of management [§ 510(d)(1), 30 U.S.C. § 1260(d)(1), and § 519(c)(2), 30 U.S.C. § 1269(c)(2)].

5. This period of postmining farming in order to achieve levels of productivity before the release of a bond could take up to ten years [§ 515(b)(20), 30

U.S.C. § 1265(b)(20)]. The required level of productivity on prime farmland cannot be returned without a protracted period of farming. See OSM Comments to 30 C.F.R. § 823.15, wherein it is stated:

> According to Grandt (1978, p. 65) approximately 5 years' growth of deep-rooted legumes, such as alfalfa and grasses, on sites where the topsoil has been replaced should help restore the soil quality for cropland uses. . . . To ensure minimum delay in restoring the productive capacity of prime farmland, a 10-year limit has been placed on the time which can elapse between soil replacement and the initiation of the [3-year] performance test for revegetation success. [44 Fed. Reg. 15,287 (1979).]

6. These "prime farmland provisions" are *per se* land use control and planning decisions which will be implemented in Indiana either by a State program which cannot vary these provisions, or by a Federal program.

7. The expressions of the congressional leaders at the time of the introduction of the prime farmland provisions demonstrate the intent that such land should be returned to a use of farming and that this is explicitly required on the face of the prime farmland provisions. Senator Percy stated from the floor at the time of the introduction:

> For the first time, the Federal Government would be taking into account that these prime agricultural lands are an invaluable resource to us, and we cannot simply pave over them, we cannot simply urbanize them all—and we simply cannot strip mine them, *unless we assure ourselves that all prime lands that are mined will be returned to their original use and their original level of productivity.* [123 Cong. Rec. S8,105 (daily ed. May 20, 1977); emphasis added.]

8. This was also stated as the reason for the absence of a variance provision for prime farmland. Senator Culver stated:

> Under the current bill the language states that an applicant for a new permit to strip mine must demonstrate that he can restore the land affected to a condition at least fully capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses.
>
> It is true, as the floor manager of the bill suggests, that implicit in this is that a reasonable person may interpret it, and so construe it, that a restoration to *prime agricultural land use would be a minimal essentiality under that language. But that caveat of a higher or better use is the hooker. That is the loophole you can drive a truck through.* I shall tell why.
>
> The effect of this amendment is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. *We are giving all that discretionary authority to some bureaucrat.*
>
> *I do not want to do that. . . .* [123 Cong. Rec. S8,111 (daily ed. May 20, 1977); emphasis added.]

9. The absence of variance provisions from the prime farmland provisions, and from the topsoil and the approximate original contour provisions, at least as meaningful to Indiana, demonstrates the postmining land use control and planning aspects of these provisions. While in other provisions which are applicable only to other parts of the country, i.e., mountaintops and steep slopes [§ 515(c) and (e), 30

U.S.C. § 1265(c) and (e)], variances have been provided based on "equal or better economic or public use of the affected land, as compared with premining use." The prime farmland, original contour and topsoiling provisions as applicable in the Midwest have no meaningful variances. Implicit is that there is no higher and better postmining land use than is provided by the prime farmland, approximate original contour and topsoiling provisions in Indiana. This was the express congressional intent of disallowing variances as set forth in the Senate Report on the bill that evolved into the Surface Mining Act:

> [T]he Committee did recognize that there are some valid and important reasons for allowing limited variances to prescribed standards of the bill, where such variances provide equal or better protection to the environment, *and result in a higher postmining land use.* [S. Rep. No. 95-128, 95th Cong., 1st Sess. 55 (1977); emphasis added.]

10. In commenting on the variance allowable from the approximate original contour in mining on steep slopes, it was stated:

> [T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably —without rigid contour requirements—there is no reason why further beneficial land uses cannot be carried out on reclaimed land. . . .
>
> * * *
>
> It must be borne in mind that protection of environmental values does not in every instance require return to an original contour. [123 Cong. Rec. S8,101 (daily ed. May 20, 1977) (remarks of Senator Byrd).]

Thus, it is clear that the approximate original contour provision was enacted by Congress based upon land use considerations, and that the failure to provide such variances on prime farmland within the Midwest is a Federal land use decision that no higher or better use exists for such land.

11. The Act as applied in Indiana which contains no steep slopes and will not allow the State to make any variance in its program, nor will a Federal program have any variances, from the prime farmland or approximate original contour requirements or topsoiling requirements due to the express land use planning policy decisions of the Federal Government.

12. Other provisions require, as a condition to granting a permit to surface mine, that the regulatory authority approve changes in the postmining land use. Provisions of the Act also require that a proposed postmining land use differing from a premining land use be approved by a regulatory authority which either directly mandate state governmental structures or usurp the function in land use planning and control policy. See Part I(C), Conclusion No. 4 setting forth this effect from § 507(d) [30 U.S.C. § 1257(d)], § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4) (8) and (10)], § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)], and § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)]. These provisions resulted in the Secretary's regulations [30 C.F.R. § 816.133] and the definition of "land use" in 30 C.F.R. § 701.5, which categorizes the various land uses and delineates that a change of the postmining land use from one of the categories set forth to another "shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority."

13. The Congressional intent to regulate the use of land is shown in the legislative history, such as the following:

> [T]he permit process requires the submission and *approval* of postmining land use and thus is designed to elicit an evaluation of the operator's plan and ability to return the land to a useful condition. . . .
>
> . . . [S]urface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses. [H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 93-94 (1977); emphasis added.]

14. It is self-evident on the face of the provisions concerning areas unsuitable for surface coal mining [§ 522, 30 U.S.C. § 1272] that it is directed solely at land use planning and control considerations through required government structures. Further, § 522(e)(4) [30 U.S.C. § 1272(e)(4)] mandates changes or a Federal usurpation of Indiana County Commissioners' or the State Highway Department's authority to regulate county and state road relocations and closings.

15. That the foregoing provisions are directed primarily at land use control and planning policies is further evident from the fact that they are not related to control of air or water pollution as previously found by the Court. Additionally, in the instance of the prime farmland provisions, the use of farming is in fact a major contributor to water pollution by sedimentation.

16. The foregoing provisions require explicit governmental procedures and structures for land use planning and control, and contain explicit land use

judgments which will either be implemented through direct Federal usurpation in a Federal program or mandated upon States to be contained within a State program, and constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control. The foregoing provisions are, therefore, contrary to the Tenth Amendment.

17. All of the above provisions are part of a Federal land use policy of making surface mining an unpreferred land use to underground mining as well as farming, which is expressly set forth on the face of the Act in § 101(b) [30 U.S.C. § 1201(b)], § 102 (c) [30 U.S.C. § 1202(c)], 102(k) [30 U.S.C. § 1202 (k)], and § 522[30 U.S.C. § 1272], as well as in § 515(b)(12) [30 U.S.C. § 1265(b)(12)], which prohibits surface mining near underground mining regardless of prior rights questions. The Interagency Task Force Report establishes that the original prime farmland provisions were based on the assumption that sufficient coal existed which could be mined by the underground method so that surface coal mining was unnecessary. The Report found these provisions were based on "two studies on the effects of surface mining on prime farmlands in Illinois, one of which was funded by the Department of Health, Education, and Welfare, and the other conducted by Jack Doyle of the Environmental Policy Center" [Report, p. 17], which studies indicated:

> So long as there are deep mineable coal reserves in the quantities found in Illinois, there is no need to gamble away long term productive agricultural capacity at the hand of short-term mining economies. [Report, p. 17.]

18. This policy is a land use control and planning policy which when combined with the express functions of the provisions set forth above makes it even clearer that these provisions are a displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning and are, therefore, contrary to the Tenth Amendment.

19. Under any balancing requirement, the State interest is paramount. The water pollution control provisions are unaffected. Any adverse substantial effect on interstate commerce which is alleviated by the foregoing provisions is trivial at best, while the harmful effects on land use control and planning for Indiana, as well as the extent of the intrusion, are great.

III.

SUBSTANTIVE DUE PROCESS

(A) *Issues*:

Plaintiffs challenge "the prime farmland provisions" and approximate original contour provision [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)] as violating the due process and equal protection guarantees of the Fifth Amendment. Plaintiffs contend that the absence of variances for the prime farmland provisions, and the absence of variances for the approximate original contour provisions for lands within the Midwest, and Indiana in particular, as are provided for mining on steep slopes and mountaintops, constitutes discriminatory, arbitrary, and irrational treatment in violation of the Fifth Amendment, in that

there is no legitimate Federal or national interest to be served by or to justify the lack of variances.

The Court's inquiry with respect to the discriminatory or selective nature of the foregoing provisions is whether there is an overriding national interest which justifies the discriminatory treatment, and whether there is a legitimate basis for presuming that the selectivity in application of the provisions is actually intended to serve that interest. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). The Court must further determine whether the lack of variances for land within Indiana and the Midwest is rational in light of the purported constitutional end—the alleviation of air or water pollution.

(B) *Findings:*

1. Indiana does not contain mountaintops or steep slopes.

2-3. Findings No. 1 and 2, Part II, are incorporated by reference.

4. The prime farmland and approximate original contour requirements become senseless and tantamount to economic waste where they are not necessary to a postmining land use—as commercial and industrial purposes, residential or housing purposes, or recreational purposes.

(C) *Conclusions:*

1. The lack of variance procedures to the prime farmland provisions, and the limitation of the variance from the approximate original contour requirement [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)] to mining on mountaintops and steep slopes, discriminate against the mining operators and States, as Indiana, within the Midwest which have significant coal re-

serves under prime farmland and no or few steep slopes or mountaintops.

2. There is no rational basis to support that the discriminatory treatment toward plaintiffs and the States in the Midwest, or that the failure to grant plaintiffs equal variances, furthers a legitimate "national interest." For selective or discriminatory Federal legislation to be valid under the Fifth Amendment, there must be an overriding national interest justifying such difference in treatment, and there must be "a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). Furthermore, for the provisions to be a lawful exercise of the Commerce Clause power, the rational basis for the discriminatory treatment must be justified by a "substantial and adverse effect on interstate commerce".

3. There is no overriding national interest justifying the lack of variances for the prime farmland and approximate original contour provisions on lands within the Midwest, and particularly Indiana, so as to justify the discriminatory treatment imposed upon plaintiffs and the State of Indiana. The variances provided for the approximate original contour provisions in the case of mining on steep slopes and mountaintops were based upon land use considerations and not on matters related to air or water quality. The failure to provide for such variances in the Midwest, including variances for the prime farmland provisions, demonstrates that Congress considered there to be no higher or better use for lands within the Midwest which is not, however, an overriding national interest, particularly since the regulation of the use of lands within the States is not a legitimate federal interest in the face of the Tenth Amendment.

4. In addition, the prime farmland and approximate original contour provisions are irrational, arbitrary and capricious requirements in situations where they are not reasonably necessary to achieve a particular postmining use—as where the land will be used for commercial and industrial purposes, residential or housing purposes, or recreational purposes. Therefore, the prime farmland and approximate original contour provisions constitute a deprivation of substantive due process in violation of the Fifth Amendment.

IV.

TAKING WITHOUT JUST COMPENSATION

(A) *Issues:*

Plaintiff coal companies challenge § 510(d)(1) [30 U.S.C. § 1260(d)(1)] and § 519(c)(2) [30 U.S.C. § 1269(c)(2)] which require that to obtain a permit an operator must demonstrate that he has the "technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management . . .," and the bond may not be released on prime farmland until "soil productivity . . . has returned to equivalent levels of yield as non-mined land of the same soil type in the surrounding area under equivalent management practices. . . ." Plaintiffs also challenge § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] which requires that the premining productivity of the land under high levels of management be set forth as a target level of yield in the reclamation plan. Plaintiff coal companies contend that under the state of the art it is scientifically and technologi-

cally impossible to return surface mined prime farmland to equivalent levels of yield where the level of management practice is a "high level of management practice," and therefore, they will be unable to mine coal and their property will be taken without just compensation contrary to the Fifth Amendment taking clause.

Plaintiff coal companies contend that § 522 [30 U.S.C. § 1272], dealing with areas unsuitable for surface mining whereby surface mining could be prevented pursuant to subsections (a), (c) and (d), and, further, where surface mining and surface mining operations are prevented pursuant to § 522 (e)(4) and (5) [30 U.S.C. § 1272(e)(4) and (5)], constitute a taking of their property without just compensation in violation of the Fifth Amendment taking clause.

(B) *Findings*:

1. There are no known studies conducted by agricultural schools or other published scientific data which demonstrate that, using the required methods of reclamation for prime farmland, prior levels of yield under high levels of management can be achieved. [Tr. 58.]

2. The research and studies conducted to date demonstrate that, at best, prior productivity can be achieved only under basic levels of management. The difference between productivity under basic levels of management and high levels of management is approximately one-third. [Tr. 61.] That is, yields obtained under high levels of management are approximately one-third greater than those obtained under basic levels of management.

3. Plaintiff AMAX Coal Company intends to mine on prime farmland in the immediate future. [Plaintiffs' Exhibits 33 and 34.] On each of these pieces of property, plaintiff AMAX Coal Company owns only the coal; it does not own the surface rights. Therefore, unless plaintiff AMAX Coal Company is permitted to mine the prime farmland, it will be deprived of mining the coal which is the only value of the coal, and the sole interest of said plaintiff in the property will be taken. Neither plaintiffs nor any other mine operators can demonstrate that prime farmland can be restored to prior levels of productivity under high levels of management.

(C) *Conclusions*:

1. In mining on prime farmland, the Act requires that such land be reclaimed and restored to equivalent levels of productivity under "high levels of management," at least where such level is the practice in the surrounding area.

2. The Court having concluded as a matter of fact that it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved, the coal companies will be prevented from mining coal under such land. Coal in Indiana can be owned as a mineral interest and if coal cannot be removed, the mineral interest is destroyed. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

3. Similarly, § 522(a), (c) and (d) [30 U.S.C. § 1272(a), (c) and (d)] provide a procedure to prevent the removal of coal thereby destroying the mineral interest.

4. Sections 522(e)(4) and (5) [30 U.S.C. § 1272 (e)(4) and (5)] prohibit the removal of coal and any other activity related to surface coal mining operations in certain areas, again destroying the mineral interest and owner's rights.

5. These sections of the Act do not provide for just compensation through eminent domain proceedings. *Pennsylvania Coal Co., supra.* These sections of the Act are, therefore, contrary to the taking clause of the Fifth Amendment and are unlawful and contrary to the Constitution of the United States.

V.

PROCEDURAL DUE PROCESS

(A) *Issues*:

Plaintiffs challenge the constitutionality of § 518(c) [30 U.S.C. § 1268(c)] of the Act, which requires persons charged with a violation of the Act, regulations or permit condition to prepay the full amount of the proposed penalty for such alleged violation as a condition precedent to contesting either the fact of the violation or the amount of the proposed penalty. Plaintiffs contend that such forced prepayment of penalty violates the procedural due process requirement of the Fifth Amendment.

The Court's inquiry is whether persons charged with a violation of the Act, regulations or permit condition are afforded a prior opportunity to be heard before their property (the proposed monetary penalty) is taken from them. *Fuentes* v. *Shevin*, 407 U.S. 67, 96 (1972). If such is not the case, the Court must further inquire as to whether there is a valid governmental interest that justifies postponing

the hearing until after such property is taken. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971).

(C) *Conclusions*:

1. Section 518 [30 U.S.C. § 1268] of the Act provides for the assessment of civil penalties against any mining operator who violates any permit condition or provision of the Act or regulations, which penalties can be as much as $5,000 per day for each such violation. Pursuant to § 518(c) [30 U.S.C. § 1268(c)], any operator charged with a penalty may contest either the amount of the penalty or the fact of a violation only by prepaying in full the amount of the proposed penalty. The failure to prepay such amount results in a waiver of all legal rights to contest the violation or the amount of the penalty.

2. All district courts which have addressed the issue have held that § 518(c) [30 U.S.C. § 1268(c)] violates the procedural due process guarantees of the Fifth Amendment. *See Virginia Surface Mining and Reclamation Ass'n, Inc.* v. *Andrus*, No. 78-0224-B (W.D.Va. Jan. 3, 1980), slip op. at 37-38; *Star Coal Co.* v. *Andrus*, No. 79-171-2 (S.D.Iowa Feb. 13, 1980), slip op. at 19 (hearing on motion for preliminary injunction).

3. Section 518(c) [30 U.S.C. § 1268(c)] of the Act violates the due process clause of the Fifth Amendment contrary to *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). In the situations encompassed by § 518(c) [30 U.S.C. § 1268(c)], there are no extraordinary circumstances with a valid governmental interest at stake so as to justify the requirement of prepaying the full amount of the proposed penalty in escrow in order to be entitled to a hearing on the fact of a

violation or the amount of the proposed penalty, or to justify the requirement that the failure to prepay such amount in full constitutes a waiver of all legal rights to contest the same. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971).

4. The administrative procedure providing for an informal conference before the assessment of the proposed penalty [30 C.F.R. § 845.17-18] is insufficient to cure the constitutional infirmity of § 518(c) [30 U.S.C. § 1268(c)].

DATED this 10th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA;
OTIS R. BOWEN, M.D., Governor of the
State of Indiana;
JOSEPH D. CLOUD, Director of the
Indiana Department of Natural Resources; and
INDIANA DEPARTMENT OF NATURAL RESOURCES,
PLAINTIFFS

vs.

CECIL D. ANDRUS, as Secretary of the United States
Department of the Interior;
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
UNITED STATES DEPARTMENT OF THE INTERIOR;
and the UNITED STATES OF AMERICA, DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION;
MEADOWLARK FARM, INC.;
AMAX COAL COMPANY, a division of AMAX INC.;
PEABODY COAL COMPANY; and
JOHN A. CONLON, a resident and citizen of
the State of Indiana, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA;
THE UNITED STATES DEPARTMENT OF THE INTERIOR;
CECIL D. ANDRUS, as Secretary of the United States Department of the Interior;
THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
and
WALTER J. HEINE, as Director of the Office of Surface Mining Reclamation and Enforcement,
DEFENDANTS

ORDER AND JUDGMENT

This Court having previously made its Findings of Fact and Conclusions of Law, the Court now renders its judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED that:

1. The following provisions of the 1977 Surface Mining Control and Reclamation Act, P.L. 95-87, 30 U.S.C. §§ 1201 *et seq.* [hereinafter the Act] are not within any powers delegated to Congress pursuant to the Constitution of the United States and are therefore unlawful as being contrary to the Constitution, and such provisions are contrary to the Tenth Amendment, even if they are an exercise of the Commerce Clause power, and are, therefore, further unlawful as contrary to the Constitution:

(a) § 507(b)(16) [30 U.S.C. § 1257(b)(16)];

(b) § 701(20) [30 U.S.C. § 1291(20)];

(c) § 508(a)(2), (3), (4), (8) and 10)[30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)];

(d) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(e) § 515(b)(7) [30 U.S.C. § 1265(b)(7)];

(f) § 515(b)(19) [30 U.S.C. § 1265(b)(19)] insofar as that portion which provides ". . . achieve the approved postmining land use plan . . .";

(g) § 515(b)(20) [30 U.S.C. § 1265(b) (20)], as to that portion which provides, "when the regulatory authority approves a long-term intensive agricultural postmining land use" and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .;", and any other part which requires any post-mining land use.

(h) § 519(c)(2) [30 U.S.C. § 1269(c)(2)], as to that portion which provides ". . . until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices";

(i) § 515(b)(3) [30 U.S.C. § 1265(b)(3)];

(j) § 515(b)(5) [30 U.S.C. § 1265(b)(5)];

(k) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)]; and

(l) § 510(b)(1) and (2) [30 U.S.C. § 1260 (b)(1) and (2)] to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or of any change in

postmining land use from the premining land use.

2. The following provisions of the Act are contrary to the procedural and substantive requirements, including equal protection aspects, of the Due Process Clause of the Fifth Amendment:

(a) The provisions of the Act in Paragraph 1(a) through (h) hereof;

(b) § 515(b)(3) [30 U.S.C. § 1265(b)(3)]; and

(c) § 518(c) [30 U.S.C. § 1268(c)].

3. The following provisions of the Act are contrary to the Taking Clause of the Fifth Amendment:

(a) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(b) § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] as to that portion "the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products . . . obtained under high levels of management;"

(c) § 519(c)(2) [30 U.S.C. § 1269(c)(2)] as to that portion which provides that a bond on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . ."; and

(d) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of the Department of the Interior and the Director of the Office of Surface Mining Reclamation and Enforcement are hereby enjoined from taking any measures to enforce or give any effect to the provisions of the Act set forth in Paragraphs 1, 2, or 3 hereof, including but not limited to enforcement, the promulgation of regulations, approval or disapproval of State programs, promulgation or implementation of a Federal program, or denying or withholding funds or grants which measures or actions are taken under sections of the Act not set forth in this Judgment, but which measures or actions are based in whole or in part on the sections of the Act set forth in Paragraphs 1, 2, or 3 hereof.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED by the Court this 10th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF THE INTERIOR, ET AL.,
DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the federal defendants appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 10, 1980.

The appeal is taken pursuant to 28 U.S.C. 1252 and 2101.

Respectfully submitted,

VIRGINIA DILL MCCARTY
United States Attorney
HAROLD R. BICKHAM
Assistant United States Attorney

ALFRED T. GHIORZI
Attorney, Department of Justice
Land & Natural Resources
Division
Ben Franklin Station
P.O. Box 7415
Washington, D.C. 20044

DATED: June 16, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. P 78-500-C

STATE OF INDIANA, ET AL.

vs.

CECIL D. ANDRUS, ET AL.

No. IP 78-501-C

INDIANA COAL ASSOCIATION, ET AL.

vs.

DEPARTMENT OF INTERIOR, ET AL.

ENTRY DENYING APPLICATION FOR A STAY OF ORDER

This matter is before the Court upon the application of counsel for the federal defendants in the above entitled cause of action requesting an order staying enforcement of the final order entered by the Court on June 10, 1980, counsel for the plaintiffs having responded with a brief in opposition to the requested stay. Whereupon the Court, having examined the motion and briefs filed in support thereof and opposition thereto, and having concluded that a stay is not merited under the present circumstances,

hereby DENIES the motion for a stay pending appeal.

IT IS SO ORDERED.
DATED this 25th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1179

CECIL D. ANDRUS, Secretary of the Interior, ET AL., APPELLANTS

v.

INDIANA, ET AL.

ORDER

UPON CONSIDERATION of the application of the Solicitor General and the opposition filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Southern District of Indiana, Nos. IP 78-500-C and IP 78-501-C, entered June 10, 1980, be, and the same is hereby, stayed pending the filing and disposition of the appeal by this Court.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day of July, 1980.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in pertinent part:

> The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * * And To make all Laws which shall be necessary and proper for carrying into Execution that foregoing Powers * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 507(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1257 (b), provides in pertinent part:

> The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things—
>
> * * * *
>
> (16) for those lands in the permit application which a reconnaisance inspection suggests may

be prime farm lands, a soil survey shall be made or obtained according to standards established by the Secretary of Agriculture in order to confirm the exact location of such prime farm lands, if any * * *.

Section 508(a) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1258(a), provides in pertinent part:

> Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this chapter shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Fedearl program can be accomplished, a statement of:
>
> * * * * *
>
> (2) the condition of the land to be covered by the permit prior to any mining including:
>
> (A) the uses existing at the time of the application, and if the land has a history of previous mining, the uses which preceded any mining; and
>
> (B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey prepared pursuant to section 1257(b)(16) of this title; and
>
> (C) the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management;

(3) the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, State and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(4) a detailed description of how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

* * * * *

(8) the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs;

* * * * *

(10) the consideration which has been given to developing the reclamation plan in a manner consistent with local physical environmental, and climatological conditions * * *.

Section 510 of the Surface Mining Act, 30 U.S.C. (Supp. I) 1260, provides in pertinent part:

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

* * * * *

(d)(1) In addition to finding the application in compliance with subsection (b) of this section, if the area proposed to be mined contains prime farmland pursuant to section 1257(b)(16) of this title, the regulatory authority shall, after consultation with the Secretary of Agriculture, and pursuant to regulations issued hereunder by the Secretary of Interior with the concurrence of the Secretary of Agriculture, grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in section 1265(b)(7) of this title. Except for compliance with subsection (b) of this section, the requirements of this paragraph (1) shall apply to all permits issued after August 3, 1977.

Section 515(b) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1265(b), provides in pertinent part:

General performance standards shall be applicable to all surface coal mining and reclama-

tion operations and shall require the operation as a minimum to—

* * * *

(3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retaain moisture to assist revegetation or as otherwise authorized pursuant to this chapter): *Provided, however,* That in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region: *And provided further,* That in surface coal min-

ing where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall after restoring the approximate contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that such overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of this chapter;

* * * * *

(5) remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor

quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation;

* * * * *

(7) for all prime farm lands as identified in section 1257(b)(16) of this title to be mined and reclaimed, specifications for soil removal, storage, replacement, and reconstruction shall be established by the Secretary of Agriculture, and the operator shall, as a minimum, be required to—

(A) segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;

(B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water

erosion or contamination by other acid or toxic material;

(C) replace and regrade the root zone material described in (B) above with proper compaction and uniform depth over the regraded spoil material; and

(D) redistribute and grade in a uniform manner the surface soil horizon described in subparagraph (A);

* * * * *

(19) establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan;

(20) assume the responsibility for successful revegetation, as required by paragraph (19) above, for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with paragraph (19) above, except in those areas or regions of the country where the annual average precipitation is twenty-six inches, or less, then the operator's assumption of responsibility and liability will extend for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work: *Provided,* That when the regulatory authority approves a long-term intensive agricultural postmining land use, the applicable five- or ten-year period of responsibility for revegetation shall commence at the date of initial planting for such long-term intensive agricul-

tural postmining land use: *Provided further,* That when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan, the authority may grant exception to the provisions of paragraph (19) above * * *.

Section 518(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1268(c), provides:

> Upon the issuance of a notice or order charging that a violation of the chapter has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Section 519(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1269(c), provides in pertinent part:

> The regulatory authority may release in whole or in part said bond or deposit if the authority is satisfied the reclamation covered by the bond

or deposit or portion thereof has been accomplished as required by this chapter according to the following schedule:

* * * * *

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan. When determining the amount of bond to be released after successful revegetation has been established, the regulatory authority shall retain that amount of bond for the revegetated area which would be sufficient for a third party to cover the cost of reestablishing revegetation and for the period specified for operator responsibility in section 1265 of this title of reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 1265(b)(10) of this title or until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to section 1257(b)(16) of this title. Where a silt dam is to be retained as a permanent impoundment pursuant to section 1265(b)(8) of this title, the portion of bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

Section 522 of the Surface Mining Act, 30 U.S.C. (Supp. I) 1272, provides in pertinent part:

> (a) (1) To be eligible to assume primary regulatory authority pursuant to section 1253 of this title, each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in paragraphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the chapter of any area so designated.
>
> (2) Upon petition pursuant to subsection (c) of this section, the State regulatory authority shall designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of this chapter is not technologically and economically feasible.
>
> (3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—
>
> > (A) be incompatible with existing State or local land use plans or programs; or
> >
> > (B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or
> >
> > (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber

products, and such lands to include aquifers and acquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes—

(A) a State agency responsible for surface coal mining lands review;

(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on August 3, 1977, or under a permit issued pursuant to this chapter, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

* * * * *

(c) Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any party to the hearing, a written decision regarding the petition, and the reasons therefore.[1] In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

(d) Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.

(e) After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—

* * * * *

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Section 701(20) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1291(20), provides:

For the purposes of this chapter—

(20) the term "prime farmland" shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 325984 49

No. 80-231

FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

Appellants,

v.

STATE OF INDIANA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

JOINT APPENDIX

WADE H. McCREE, JR.
Solicitor General
JAMES W. MOORMAN
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
PETER BUSCEMI
Assistant to the Solicitor General
PETER R. STEENLAND, JR.
MICHAEL A. McCORD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THEODORE L. SENDAK
Attorney General
State of Indiana
JACK R. O'NEILL
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6357

For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR.
BYRON L. MYERS
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213

For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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No. 80-231

In The

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

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v.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

JOINT APPENDIX

DOCKET ENTRIES

State of Indiana, et al. v. Cecil D. Andrus, et al.,
No. IP 78-500-C

Date	*Proceedings*
8/16/78	Complaint filed. Summons issued. Cover sheet filed.
8/16/78	Joint Motion for Consolidation filed.
8/17/79	Plaintiff fiels (sic) Moton (sic) for leave to amend by interlineation; c/s.
8/29/78	U.S. Marshals return-Summons & Complaint & Motion served on the U.S. Dept. of Interior by certified mail on 8/17/78. Served on Walter J. Heine, Dir. of the Office of Surface Mining by certified mail on 8/17/78. Served on the Office of Surface Mining Reclamation & Enforcement by certified mail on 8/17/78. Served on Cecil Andrus, Sec. of the U.S. Dept. of Interior by certified mail on 8/17/78. Served on Griffin B. Bell by certified mail on 8/17/78. Served on Virginia D. McCarty, U.S. Atty. on 8/17/78. Fee $56.00.
9/6/78	Court enters order of consolidation with Cause Number: IP78-501-C and the causes are consolidated for all purposes and on all issues under Civil Cause Number: IP78-500-C.
9/6/78	Court GRANTS plaintiff's motion for leave to amend their complaint by interlineation. Paragraph 28, line 3, page 5, should be amended to read August 3, 1977 instead of August 30, 1977.
10/13/78	Defendants file motion for enlargement of time, c/s.
10/16/78	Court grants an extension of time to defendant to answer or otherwise plead. Time extended to and including November 15, 1978.

Date	*Proceedings*
11/15/78	Defendants file motion for enlargement of time, c/s.
11/16/78	Court grants the defendants' motion for extension of time to plead to the plaintiffs' complaint, time is now extended to and including November 22, 1978. (S.E.)
11/22/78	Government files Motion to Dismiss.
12/7/78	Plaintiffs file motion for extension of time to file answer brief on motion to dismiss. c/s
12/11/78	Plaintiff files motion for enlargement of time, c/s.
12/12/78	Court grants the plaintiffs motion for extension of time to file answer brief to the defendants motion to dismiss, time is now extended to and including Jan 7, 1979 (S.E.)
12/14/78	Court grants the State of Indiana's motion for extension of time to respond to the defendants motion to dismiss, time is now extended to and including Jan 15, 1979 (S.E.)
1/8/79	Motion of Plaintiffs, Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company and John A. Conlon for further extension of time to file brief in opposition to motion to dismiss c/s.
1/11/79	Plaintiff files Motion for enlargement of time; c/s.
1/11/79	Court grants the plaintiff's moiton (sic) for extension of time to file answer brief to the defendants motion to dismiss, time is now extended to and including Jan 17, 1979 (S.E.)
1/15/79	Notice of taking deposition of Richard M. McNabb filed; c/s.
1/17/79	State's Response to Federal Defendant's Motion to Dismiss; c/s.

Date *Proceedings*

1/18/79—Brief of plaintiffs, Indiana Coal Association, Peabody Coal Company, Amax Coal Company, Meadowlark Farms, Inc. and John A. Conlon, in opposition to the Motion to Dismiss; c/s

1/15/79—Court grants the State of Indiana's motion for extension of time to respond to the defendants motion to dismiss, time is now extended to and including January 17, 1979. (S.E.)

1/22/79—Defendant files motion for stay of discovery pending a ruling on defendants' motion to dismiss, c/s.

1/23/79—Court grants the Governments motion to stay discovery until the Court has ruled on the motion to dismiss. (S.E.)

1/26/79—State of Indiana's Motion to reconsider order granting defendant's Motion for stay of discovery; c/s

2/6/79—Defendant files answer in opposition to State of Indiana's motion to reconsider order granting defendants' motion for stay of discovery with memorandum in support thereof, c/s.

2/8/79—Motion of plaintiffs, Indiana Coal Assoc., Amax, Peabody and Conlon for the court to reconsider its order granting defendants' motion for a stay of discovery, c/s.

3/9/79—Plaintiffs file pleadings:

1) Motion for Preliminary Injunction; c/s
2) Plaintiffs' request for admissions; c/s
3) Plaintiffs' affidavits and exhibits in support of Motion for Preliminary Injunction and in opposition to defendants' Motion to Dismiss

3/12/79—Plaintiffs file pleadings:

1) Request for court to require defendants to respond to request for admissions within ten days; c/s.

Date *Proceedings*

2) Request for immediate hearing on motion for preliminary injunction; c/s.

3/13/79—Plaintiffs, Indiana Coal Association, et al files pleadings:

1) Plaintiffs' Indiana Coal Association, Peabody Coal Company, Amax Coal Company, Meadowlark Farms, Inc. and John A. Conlon, Motion for court to consider extra-pleading matters and to treat defendants' motion to dismiss as a motion for summary judgment;
2) Reply Memorandum in support of defendant's Motion to Dismiss; c/s.

3/27/79—Defendants by counsel filed Motion for enlargement of time; c/s.

3/27/79—Court grants the defendant's motion for extension of time to respond to the plaintiff's pleadings, time is now extended to and including April 16, 1979. (S.E.)

4/3/79—Plaintiff Indiana Coal Assoc. et al files pleadings:

1) Notice of deposition, c/s.
2) Brief in support of motion for preliminary injunction and in reply to defendant's reply brief in support of motion to dismiss, c/s.

4/12/79—Defendants files Motion for enlargement of time; c/s.

4/17/79—Deposition of *R. NEIL SAMPSON* filed.

4/13/79—Court grants the Governments motion for extension of time to respond to the plaintiffs pleadings, time is now extended to and including May 1, 1979. (S.E.)

4/17/79—Memorandum in opposition to plaintiffs' motion for preliminary relief and in support of defend-

Date	*Proceedings*
	ants' motion to dismiss filed by defendants, c/s.
4/17/79—	Defendant files response to request for admissions, c/s.
4/18/79—	Affidavits of Dan Lynn Rumbly and Randy E. Staley.
5/4/79—	State's Post-Hearing Brief filed; c/s.
5/4/79—	Defendants' Post-Trial brief; c/s
5/4/79—	Defendants file Motion for leave to offer additional exhibits and evidence; c/s
5/4/79—	Post-Hearing Brief in support of plaintifffs' (sic) Motion for Preliminary Injunction; c/s.
8/21/79—	Supplement to Motion to Dismiss filed by Federal Defendants, c/s
2/27/80—	Joint petition for expedited trial and decision and stipulation as to procedure filed by the Parties. Court files order on joint petition for expedited trial and decision and stipulation as to procedure. (S.E.) Court now set argument on this matter for 10:00 A.M. April 24, 1980.
3/14/80—	Plaintiff files trial brief on the merits, c/s.
4/3/80—	Defendants file trial brief on the merits, c/s.
4/9/80—	Plaintiff files joint motion for enlargement of time, c/s.
4/11/80—	Court now Grants the plaintiffs' motion for extension of time to file their reply briefs to and including April 21, 1980.
4/18/80—	Plaintiff files reply trial brief on the merits, c/s.
6/6/80—	Plaintiffs file motion to withdraw an issue, c/s.
6/10/80—	Court now grants the plaintiff's motion to withdraw an issue.

Date	*Proceedings*
6/10/80—	Court files Order and Judgment finding for the plaintiffs and against defendants. (SE.) Court files Memorandum of decision. Case Closed. Entered June 11, 1980. O.B. Vol. 26—Page 304.
6/16/80—	Federal defendants file notice of appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 10, 1980. Copy of the notice sent to the counsel of record and the court reporter. Copy of the notice of appeal, docket entries, Application for a stay of order and copy of the judgment sent to the Supreme Court. Application for a stay of order filed, c/s.
6/18/80—	Plaintiff files motion for time to respond to defendants' motion to stay, c/s.
6/18/80—	Court now Grants the plaintiffs' motion for extension of time to respond to the defendants' motion to stay.
6/23/80—	Plaintiff files memorandum in opposition to motion to stay, c/s.
6/24/80—	Plaintiff files submission of exhibit A, c/s.
6/25/80—	Court now Denies application of federal defendants for a stay of the June 10, 1980 order of this court.
7/2/80—	Official Reporter's transcript of argument on merits filed.
7/7/80—	Certified copy of Order from Supreme Court filed. Judgment of district court stayed pending the filing and disposition of appeal by Supreme Court.
10/10/80—	Certified copy of order from Supreme Court filed, and probable jurisdiction is noted.

Indiana Coal Association, et al. v. United States, et al., No. IP 78-501-C

Date	*Proceedings*
8/16/78	Complaint filed. Summons issued. Cover sheet filed.
8/16/78	Joint Motion for Consolidation filed.
8/29/78	U.S. Marshals return-Summons, Complaint & Motion served on U.S. Dept. of the Interior by certified mail on 8/17/78. Served on Walter J. Heine, Director of the Office of Surface Mining Reclamation & Enforcement by certified mail on 8/17/78. Served on the Office of Surface Mining Reclamation & Enforcement by certified mail on 8/17/78. Served on Cecil D. Andrus, Sec. of the U.S. Dept. of the Interior by certified mail on 8/17/78. Served on the U.S. Atty. General by certified mail on 8/22/78. Fee $35.00
9/6/78	Court enters order of consolidation with Cause Number: IP78-500-C and the causes are consolidated for all purposes and on all issues under Civil Cause Number: IP78-500-C.
11/22/78	Government files Motion to dismiss
12/7/78	Plaintiffs files motion for extension of time to file answer brief on motion to dismiss. c/s
12/11/79	Plaintiff files motion for enlargement of time, c/s.
12/12/78	Court grants the plaintiffs motion for extension of time to file answer brief to the defendants motion ot (sic) dismiss, time is now extended to and including Jan 7, 1979. (S.E.)
12/14/78	Court grants the State of Indianas' (sic) motion for extension of time to respond to the defendants motion to dismiss, time is now extended to and including Jan 15, 1979 (S.E.)

Date	*Proceedings*
1/8/79—	Motion by plaintiffs, Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company and John A. Conlon for further extension of time to file brief in opposition to motion to dismiss; c/s.
1/11/79—	Plaintiff files Motion for enlargement of time; c/s.
1/11/79—	Court grants the plaintiff's moiton (sic) for extension of time to file answer brief to the defendants motion to dismiss, time is now extended to and including Jan 17, 1979 (S.E.)
1/18/79—	Brief of plaintiffs, Indiana Coal Association, Peabody Coal Company, Amax Coal Company, Meadowlark Farms, Inc. and John A. Conlon, in opposition to the Motion to Dismiss; c/s.
1/15/79—	Court grants the State of Indiana's motion for extension of time to respond to the defendant's motion to dismiss, time is now extended to and including January 17, 1979. (S.E.)
1/22/79—	Defendant files motion for stay of discovery pending a ruling on defendants' motion to dismiss, c/s.
1/23/79—	Court grants the Governments motion to stay discovery until the Court has ruled on the motion to dismiss. (S.E.)
1/26/79—	State of Indiana's Motion to reconsider order granting defendants motion for stay of discovery; c/s
2/6/79—	Defendant files answer in opposition to State of Indiana's motion to reconsider order granting defendants' motion for stay of discovery with memorandum in support thereof, c/s.
2/8/79—	Motion of plaintiffs, Ind. Coal Assoc., Amax, Peabody, and Conlon for the court to recon-

Date *Proceedings*

sider its order granting defendants' motion for a stay of discovery filed, c/s.

3/9/78—Plaintiffs file pleadings:
1) Plaintiffs' request for admissions; c/s
2) Motion for preliminary injunction; c/s
3) Plaintiffs' Affidavits and exhibits in support of motion for preliminary injunction and in opposition to defendants' Motion to dismiss.

3/12/79—Plaintiffs file pleadings:
1) Request for court to require defendants to respond to request for admissions within ten days; c/s.
2) Request for immediate hearing on motion for preliminary injunction; c/s.

3/13/79—Plaintiffs, Indiana Coal Association, et al. files pleadings:
1) Plaintiffs' Indiana Coal Association, Peabody Coal Company, Amax Coal Company, Meadowlark Farms, Inc. and John A. Conlon, Motion for court to consider extra-pleading matters and to treat defendants' motion to dismiss as a motion for summary judgment; c/s.
2) Reply Memorandum in support of defendant's Motion to Dismiss; c/s.

3/27/79—Defendants file Moiton (sic) for enlargement of time; c/s.

3/27/79—Court grants the defendants motion for extension of time to respond to the plaintiffs pleadings, time is now extended to and including April 16, 1979. (S.E.).

4/3/79—Plaintiff Indiana Coal Assoc. et al files pleadings:
1) Notice of deposition, c/s.

Date *Proceedings*

2) Brief in support of motion for preliminary injunction and in reply to defendant's reply brief in support of motion to dismiss, c/s.

4/12/79—Defendants file Motion for enlargement of time; c/s.

4/17/79—Deposition of *R. NEIL SAMPSON* filed.

4/13/79—Court grants the Governments motion for extension of time to respond to the plaintiff's pleadings, time is now extended to and including May 1, 1979. (S.E.)

4/17/79—Defendants file pleadings:

1) Memorandum in opposition to plaintiffs' motion for preliminary relief and in support of defendants' motion to dismiss filed, c/s.
2) Response to request for admissions, c/s.

4/18/79—Affidavits of Dan Lynn Rumbly and Randy E. Staley filed.

5/4/79—State's Post-Trial Brief filed; c/s.

5/4/79—Defendants' Post-Trial Brief filed; c/s.

5/4/79—Defendants file Motion for leave to offer additional exhibits and evidence; c/s.

5/4/79—Post-Hearing Brief in support of plaintiffs' Motion for Preliminary Injunction; c/s.

8/21/79—Supplement to Motion to Dismiss filed by Federal Defendants.

2/27/80—Joint petition for expedited trial and decision and stipulation as to procedure filed by the Parties. Court files order on joint petition for expedited trial and decision and stipulation as to procedure. (S.E.) Court now sets argument on this matter for 10:00 A.M. April 24, 1980.

Date *Proceedings*

3/14/80—Plaintiffs' trial brief on the merits filed, c/s.

4/3/80—Defendants file trial brief on the merits, c/s.

4/9/80—Plaintiffs file joint motion for enlargement of time, c/s.

4/11/80—Court now Grants the plaintiffs' motion for extension of time to file their reply briefs to and including April 21, 1980.

4/18/80—Plaintiff files reply trial brief on the merits, c/s.

6/6/80—Plaintiffs file motion to withdraw an issue, c/s.

6/10/80—Court now grants the plaintiff's motion to withdraw an issue.

6/10/80—Court files Order and Judgment finding for the plaintiffs and against the defendants. (S.E.) Court files memorandum of decision. Case Closed. Entered June 11, 1980. O.B. Vol. 26—P. 304.

6/16/80—Federal defendants file notice of appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 10, 1980. Application for a stay of order filed, c/s. Copy of notice went to the counsel of record and court reporter. Copy of the notice of appeal, docket entries, application for a stay of order and copy of the judgment sent to the Supreme Court.

6/18/80—Plaintiff files motion for time to respond to defendants' motion to stay, c/s.

6/18/80—Court now Grants the plaintiffs' motion for extension of time to respond to the defendants' motion to stay.

6/23/80—Plaintiff files memorandum in opposition to motion to stay, c/s.

Date	*Proceedings*
6/24/80	Plaintiffs file submission of exhibit A, c/s.
6/25/80	Court now Denies application of federal defendants for a stay of the June 10, 1980 order of this court.
7/2/80	Official reporter's transcript of argument on merits filed.
7/7/80	Certified copy of order from Supreme Court filed. Judgment of district court stayed pending the filing and disposition of appeal by Supreme Court.
10/10/80	Certified copy of order from Supreme Court filed, and probable jurisdiction is noted.

PLEADINGS

State of Indiana, et al. v. Cecil D. Andrus, et al.
No. IP 78-500-C

COMPLAINT

The Plaintiffs, State of Indiana; Otis R. Bowen, M.D., Governor of the State of Indiana; Joseph D. Cloud, Director of the Indiana Department of Natural Resources; and the Indiana Department of Natural Resources, for their claim for relief against the Defendants, allege and say:

Jurisdiction

1. Jurisdiction is in this Court pursuant to 28 U.S.C. §1331 since this is a civil action which arises under the Constitution and laws of the United States.

2. Jurisdiction is also in this Court pursuant to 28 U.S.C. §1337 since this is a civil action arising under an Act of Congress purporting to regulate commerce.

3. Plaintiffs seek a declaration of the rights of the parties pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

4. Plaintiffs also seek a declaration that 30 U.S.C. §1201 *et seq.*, the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87 (hereafter Act) is unconstitutional.

5. Plaintiffs also seek to have this Court permanently enjoin the enforcement and implementation of 30 U.S.C. §1201 *et seq.* and all regulations proposed and promulgated thereunder.

Parties

6. Plaintiff State of Indiana (hereafter State), is a sovereign state of the United States, admitted to the Union as the nineteenth state in 1816.

7. Plaintiff Otis R. Bowen, M.D., Governor of the State of Indiana is the chief executive officer of the State and is charged with the duty of appointing the Director of the Indiana Department of Natural Resources as well as the members of the Natural Resources Commission.

8. Plaintiff Joseph D. Cloud, Director of the Indiana Department of Natural Resources, pursuant to I.C. 13-4-6-4, has been granted the duty and power by the Indiana General Assembly to administer; supervise and enforce the Indiana Strip Mining Reclamation act.

9. The Indiana Department of Natural Resources is charged by law with the power to investigate, to compile and disseminate information, and to make recommendations concerning the natural resources of the State and their conservation, including the drainage and reclamation of lands.

10. Defendant Cecil D. Andrus is the Secretary of the Department of Interior (hereafter Secretary), and Defendant Walter Heine is the Director of the Office of Surface Mining Reclamation and Enforcement (hereafter Director), and they are responsible for administering the Act.

11. The Defendant Office of Surface Mining Reclamation and Enforcement (hereafter Office) is a division of the Defendant Department of the Interior, and it is through the Office that the Secretary administers all aspects of the Act.

12. The United States of America, through the Department of Interior and its Secretary and the Office and its Director, has attempted to control all aspects of the reclamation of surface mined areas within the states, and has attempted to pre-empt any and all valid state laws dealing with such reclamation.

Claim for Relief

13. Indiana is in the top six (6) states in the total production of coal by surface mining techniques, and is in the top nine (9) states in the total production of coal by all mining techniques.

14. The first state to enact legislation dealing with the reclamation of surface mined areas was West Virginia in 1939. Indiana enacted its first statute in 1941, thirty-six (36) years prior to the first Federal Act.

15. Prior to the passage of the Act in 1977, thirty-eight (38) states had passed legislation dealing with the reclamation of mined area within their respective states, taking into consideration the particular variables within those states to arrive at the standards to be utilized therein. Twenty-six (26) of those states have coal mining operations within their borders, and are, therefore, affected by the Act.

16. In 1974, Indiana joined thirteen (13) states which supply approximately ninety percent (90%) of the nation's coal production, and signed the Interstate Mining Compact (hereafter Compact), I.C. 14-4-2.2-1, with purposes to:

1. Advance the protection and restoration of land, water and other resources affected by mining.

2. Assist in the reduction or elimination or counteracting of pollution or deterioration of land, water and air attributable to mining.

3. Encourage, with due recognition of relevant regional, physical, and other differences, programs in each of the party States which will achieve comparable results in protecting, conserving, and improving the usefulness of natural resources, to the end that the most desirable conduct of mining and related operations may be universally facilitated.

4. Assist the party States in their efforts to facilitate the use of land and other resources affected by the mining, so that such use may be consistent with sound land use, public health, and public safety, and to this end to study and recommend, wherever desirable, techniques for the improvement, restoration or protection of such land and other resources.

5. Assist in achieving and maintaining an efficient and productive mining industry and in increasing economic and other benefits attributable to mining.

17. Coal is the most abundant source of energy in the United States, and is used to produce ninety-seven percent (97%) of all electricity generated in Indiana.

18. The Plaintiffs regulate surface mining activities within Indiana pursuant to I.C. 13-4-6-1 *et seq.*, I.C. 14-4-2-1 *et seq.*, I.C. 14-4-2.1-1 *et seq.*, and I.C. 14-4-2.2-1 *et seq.*, which provide, *inter alia*, for the reclamation and restoration of lands adversely affected by surface mining activities.

19. The State has also enacted comprehensive legislation governing land use planning and real property within Indiana.

20. Included in the purposes of the Act, as found at 30 U.S.C. §1202, are:

. . .

(c) assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;

. . .

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

. . .

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

. . .

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

21. Pursuant to the Act, the Defendants have issued final and proposed regulations which may be found at 30 C.F.R., Part 700 *et seq.*

22. Subchapter IV of the Act establishes a fee which is, in effect, a tax or penalty, and also establishes procedures for reclaiming lands which have been "adversely affected" by past surface coal mining. 30 U.S.C. §1231 *et seq.*

23. The "Fee Collection Report" issued by the United States Department of the Interior shows that Indiana coal mining operators paid $1,970,402 in fees for the quarter ending December 31, 1977, and a total of $30,925,490. was paid by operators in the twenty-six (26) reporting states.

24. The fees paid in the quarter ending December 31, 1977, were enormous, and production of coal in that quarter was greatly reduced due to the nation-wide coal strike.

25. Preliminary figures for 1977 indicate that 27.9 million tons of coal were mined in Indiana with approximately 525,000 tons being mined by underground techniques. If the same amount is mined in 1978, Indiana coal mining operators will pay fees, pursuant to 30 U.S.C. §1232, of $9,660,000. which will, by necessity, be passed on to the consumers in Indiana and other states, including the State of Indiana as a consumer, in the form of increased costs for coal, electricity, and other products using coal in the manufacturing process.

26. Subchapter V of the Act establishes a regulatory scheme for surface coal mining, reclamation, and use of reclaimed lands. 30 U.S.C. §1251 *et seq.*

27. Pursuant to 30 U.S.C. §1253, each state in which there is or may be conducted surface coal mining operations may only assume exclusive jurisdiction over the regulation of surface coal mining by filing a state program with the Secretary which demonstrates the state has the capability of carrying out the provisions of the Act through seven specific and extensive requirements.

28. The State is required to submit its plan to the Secretary by the end of the eighteen-month period beginning August 30, 1977; the Secretary then has six months to approve or disapprove the plan; and if disapproved, the State has sixty (60) days in which to resubmit the plan which shall be approved or disapproved within sixty (60) days.

29. In the event a state fails to submit an acceptable program or fails to implement, enforce, or maintain its approved program, the Secretary, pursuant to 30 U.S.C. §1254, shall prepare, promulgate and implement a Federal program for that state.

30. Since May 4, 1978, the effective date of the Act, operators of coal mining operations within Indiana and elsewhere have been subjected to 30 U.S.C. §1252 which mandates compliance with the Federal act.

31. Pursuant to 30 U.S.C. §1265, permits issued under the Act to conduct surface coal mining operations require that the operations comply with extensive "performance standards", thereby attempting to pre-empt matters properly within the jurisdiction and control of the State.

32. The Plaintiffs allege, upon information and belief, that compliance with the Act has resulted in substantial initial capital expenditures by the operators within Indiana exceeding $100,000,000. and will result in substantial additional capital expenditures and operating expenses in the future which will, by necessity, be passed on to the consumers in Indiana and other states, including the State of Indiana as a consumer, in the form of increased costs for coal, electricity, and other products using coal in the manufacturing process.

33. If the operators fail to comply with the provisions of the Act they will be subject to penalties of up to $5,000. per day per violation plus the possibility of closure of their mines and the denial of new or renewal mining permits, all to their detriment and to the irreparable injury of such operators and the State and to the consuming public if such closures would lead to an interruption of the supply of coal.

34. The Defendants have retained complete and overall enforcement powers under the Act, regardless of the sufficiency of any present or future State laws, even though Congress found in 30 U.S.C. §1201 that because of the diversity of the factors involved in surface mining the primary responsibility of governing that activity should rest with the states.

35. Pursuant to 30 U.S.C. §1237, the Secretary, his agents, employees, or contractors, have the right "as an exercise of the police power" to enter upon any property adversely affected by past coal mining practices and any other property in order to have access to such property to do all things necessary or expedient to restore, reclaim, abate, control or prevent the adverse effects.

36. Pursuant to 30 U.S.C. §1237, the Secretary, his agents, employees, or contractors, have the right "as an exercise of the police power" to enter upon any property for the purpose of conducting studies or exploratory work to determine the existence of adverse effects of past coal mining practices and to determine the feasibility of restoration, reclamation, abatement, control or prevention of such adverse effects.

37. The Act is an unconstitutional invasion of the powers reserved to the State by the Tenth Amendment to the Constitution of the United States, and does not involve any of the powers delegated to the United States.

38. The regulations promulgated and adopted under the Act as well as the proposed regulations constitute a drastic intrusion of the federal government into the affairs of the citizens of Indiana and the State.

39. The Act is unconstitutional in that it purports to regulate, under the guise of the commerce clause, Article 1, §8, cl. 3 of the Constituion, activities purely local in nature within the State of Indiana.

40. The process of surface coal mining, reclamation, and/or the subsequent use of reclaimed lands have no substantial, direct, or indirect effects on interstate commerce.

41. The Act, and the regulations proposed and promulgated thereunder, interfere with the traditional attributes of sovereignty of the State, including, but not limited to land use control and planning, regulation of the rights to and in real property, protection of public health and safety, and it interferes with the structuring of the governmental operations of the State.

42. The sovereign powers of the State of Indiana and of the people, as reserved to them by the Tenth Amendment to the Constitution of the United States, are to be exercised by the Legislature of the State for the benefit of the citizens of the State in light of various local conditions and considerations, and are not to be exercised under threat, coercion, intimidation or undue influence by the United States.

43. The Act is unconstitutional in that it purports to allow access to private property of Indiana citizens without a warrant under "the police power," a power which does not exist in the Defendants or the Federal government.

44. The Act is not capable of enforcement since it is vague, overbroad and lacks specificity in its terms, thereby not allowing those purportedly regulated by it to know what is required of them by the law.

45. The Act pre-empts valid laws enacted by the State of Indiana which have been functioning for decades in the regulation of the reclamation of mined areas. Those laws, which have been highly successful in Indiana and which have been models for legislation by

other states, provide for higher land use reclamation than allowed by the Act, thereby necessitating the procedural requirement of applying for a variance and getting that application approved in order to effect the higher use that is required as a matter of course under Indiana law.

46. Indiana's program for reclamation is enforced and implemented by a staff of ten (10) state employees, but in order to comply with the provisions of this Act that staff will need to be increased by an additional nineteen (19) persons, the result of which is a needless, additional financial burden to the citizens of Indiana, while the effectiveness of the program will be reduced below that achieved by the State regulatory scheme.

WHEREFORE, for all the above and foregoing, the Plaintiffs respectfully pray this Court assume jurisdiction of this cause; declare 30 U.S.C. §1201 *et seq.*, Public Law 95-87, and all regulations proposed and promulgated thereunder, unconstitutional, void, and of no effect; enjoin the enforcement of 30 U.S.C. §1201 *et seq.*, Public Law 95-87, and all regulations proposed and promulgated thereunder; grant judgment to the Plaintiffs, costs versus the Defendants; and for all other just and proper relief.

STATE OF INDIANA

/s/ OTIS R. BOWEN, M.D.
Governor of the State of Indiana

INDIANA DEPARTMENT OF
NATURAL RESOURCES

/s/ JOSEPH D. CLOUD
Director, Indiana Department
of Natural Resources

/s/ THEODORE L. SENDAK
Attorney General of Indiana

/s/ DONALD P. BOGARD
Chief Counsel

Attorneys for Plaintiffs

[Filed: August 16, 1978]

Indiana Coal Association, et al. v. United States, et al.
No. IP 78-501-C

COMPLAINT

Plaintiffs for their claim for relief against defendants state:

1. The matter in controversy is a civil action and arises under the United States Constitution and laws of the United States and this Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. § 701.

2. The Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, 30 U.S.C. § 1201, *et seq.* [hereinafter "the Act"] was enacted August 3, 1977. Defendants, Cecil D. Andrus and Walter Heine, in their respective capacities as Secretary of the Department of the Interior and as Director of the Office of Surface Mining Reclamation and Enforcement are charged with responsibility for administering the Act, are presently intending to enforce the Act and have issued final and proposed regulations thereunder [30 C.F.R., Part 700 *et seq.*].

3. Plaintiffs, AMAX Inc. through its division AMAX Coal Company, Peabody Coal Company and the members of the Indiana Coal Association [hereinafter "Coal Company Plaintiffs"] are owners and operators of surface coal mines in the State of Indiana and in other states and some of them have present plans for enlarging such surface mining operations and for opening of new mining operations which are subject to the requirements of the Act; and plaintiff John A. Conlon is a resident of the State of Indiana. Defendant Meadowlark Farms, Inc. owns interests in realty, some including fee simple absolute and some including only the coal in-

terests; and Meadowlark leases some of such realty interests including coal to AMAX Inc. After removal of the coal and reclamation, Meadowlark performs farming operations on the reclaimed land.

4. Title IV of the Act establishes a tax or penalty and procedures for reclaiming lands which have been adversely affected by past surface coal mining.

5. Title V of the Act establishes a regulatory scheme for surface coal mining, reclamation, and use of reclaimed lands.

6. Coal Company Plaintiffs are subject to Act § 502(c) which became effective May 4, 1978, which requires that such plaintiffs comply with provisions of: Act § 515(b)(2) [requiring restoration of land affected by surface coal mining operations to a "condition capable of supporting [prior] uses . . . or higher or better uses"]; Act § 515(b)(3) [requiring land affected by surface coal mining operations to be reclaimed to establish the "approximate original contour of the land"]; Act § 515(b)(5) [requiring removal of top soil in surface coal mine operations in separate layers and to segregate the same]; Act § 515(b)(10) [requiring operators to minimize disturbances to prevailing hydrologic balance]; Act § 515 (b)(13) [concerning treatment of mine waste piles]; Act § 515(b)(15) [concerning use of explosives]; Act § 515(b)(19) [concerning establishment of permanent vegetative cover on reclaimed land]; and Act § 515(d) [concerning standards for steep slope surface coal mining]. As more specifically hereafter alleged, defendants also are wrongfully and without authority attempting to presently enforce Act § 515(b)(7).

7. Coal Company Plaintiffs have not, prior to May 4, 1978, been required to conduct operations of surface coal

mining in accordance with the foregoing provisions of the Act; Coal Company Plaintiffs' compliance with such provisions has resulted in substantial initial capital expenditures in excess of $100 million and will result in substantial additional capital expenditures and substantial increases in operating expenses.

8. If Coal Company Plaintiffs fail to comply with the aforementioned sections of the Act on and after May 4, 1978, such plaintiffs will be subject to penalties of up to $5,000 per day per violation and enforcement provisions of the Act which include closure of the mines of such plaintiffs, denials of new mining permits and denials of renewal mining permits, all to the detriment and the irreparable injury of such plaintiffs.

9. After the approval of a state program under Act § 503 or a federal program under Act § 504, Coal Company Plaintiffs will be required to comply with the entirety of Title V of the Act.

10. Coal Company Plaintiffs have paid and must continue to pay a tax or penalty pursuant to Act § 402.

11. Regardless of the sufficiency of any present or future laws or program of the State of Indiana which are mandated by the Act, the United States has retained complete and overall enforcement powers under the Act.

12. The entirety of Title V of the Act and portions of Title IV of the Act are contrary to the Constitution of the United States as more fully set forth hereafter.

13. Plaintiffs' remedies at law are inadequate and plaintiffs will suffer irreparable harm unless the Court grants the relief as hereinafter requested.

14. Title V of the Act is contrary to the Constitution of the United States in that the United States pur-

portedly is exercising power to regulate under the commerce clause of the Constitution (Art. I, § 8, cl. 3).

15. The process of surface coal mining, reclamation and/or the subsequent use of the reclaimed land are purely local activities confined within the State of Indiana and other states where such activities take place.

16. The process of surface coal mining, reclamation, and/or the subsequent use of the reclaimed land have no substantial, direct or indirect effect on interstate commerce.

17. There is no rational basis for any conclusions or findings of Congress (§ 101 of the Act) that surface coal mining operations, surface coal mining reclamation, or subsequent land use have any effect or burden on interstate commerce.

18. If there is a rational basis for a finding that some aspect of surface coal mining, or reclamation, or subsequent land use result in any effect or burden on interstate commerce, provisions of Title V are not reasonably adapted to, limited to, or related to removing or regulating any effect or burden on interstate commerce.

19. The State of Indiana is presently, and was prior to the Act, regulating surface mining activities under IC 13-4-6-1, *et seq.* and IC 14-4-2-1, *et seq.* and under IC 14-4-2.1-1, *et seq.* the State of Indiana is presently, and had prior to the Act, made provision for the restoration and reclamation of land located in the State of Indiana which has been adversely affected by past surface mining practices, including surface coal mining practices.

20. Titles IV and V of the Act are contrary to the Tenth Amendment of the Constitution of the United States in that the United States is interfering with the

structuring of the governmental operation of the states, including the State of Indiana, and with the functions essential to the states, including the State of Indiana and its citizens under the Constitution of the United States as alleged in paragraphs 21-28 hereafter, and in particular:

a. Pursuant to Act § 502(b) the State of Indiana is required to issue mining permits in compliance with Title V of the Act.

b. Pursuant to Act §§ 507, 508, 510, 515 and 522(a), (c) and (d) reclamation to facilitate subsequent land use and land use planning is required of the State of Indiana pursuant to federally created standards which are unrelated to any power of the United States enumerated under the Constitution of the United States, and such are an exercise of a power reserved to the states, including the State of Indiana, or the people.

c. Pursuant to Act § 522(e)(3), (4) and (5), surface coal mining is prohibited, unless waivers or approvals are obtained pursuant thereto, and public road relocation is required under Act § 522(e)(4). Such attempts at regulation are not related to, and are not authorized by, any enumerated power of the Constitution of the United States, but are related solely to powers reserved to the states, including the State of Indiana, and to the people.

d. Pursuant to Act § 510(b)(6), the Act allows a federal authority to adjudicate private property rights, in that a surface coal mining permit will be denied if a dispute exists as to whether the operator has rights to surface mine. Such is not authorized by any enumerated power of the Constitution of the United States, but is related solely to powers reserved to the states, including the State of Indiana, and to the people.

e. Pursuant to Act § 515, standards and procedures for regulation of reclamation and subse-

quent land use are established. Such are not authorized by any enumerated power of the Constitution of the United States, but are related solely to powers reserved to the states, including the State of Indiana, and to the people.

21. Act § 503 allows the State of Indiana to administer and enforce parts of Title IV and all of Title V. Act § 405(c) allows funds to be distributed to the State of Indiana, only on the condition that the State of Indiana exercises its sovereign powers by enacting laws consistent with the Act and the regulations promulgated thereunder.

22. Titles IV and V in whole or in part are unconstitutional as being contrary to the delegated powers of the United States under the Constitution of the United States and contrary to the Tenth Amendment thereof; although many of the provisions, which are unconstitutional when exercised by the United States, may be validly exercised by the various states, including the State of Indiana, pursuant to their sovereign and retained powers.

23. The United States, intentionally with the purpose of coercing, intimidating and otherwise unlawfully causing the states to exercise their sovereign powers, enacted the Act and so commingled the provisions which might be lawful for the United States to enact, with provisions which are unlawful, that the State of Indiana and its citizens cannot determine whether it is in the best interests of the citizens and of the State to exercise its sovereign powers, enact legislation, and administer Title IV and Title V. As a result of regulations promulgated by the defendants under the Act, the State of Indiana has been coerced and unlawfully forced in violation of its sovereign power reserved under the Constitution to

enact legislation to enforce and to administer parts of Title V of the Act.

24. The sovereign powers of the State of Indiana and of the people, as retained by the Tenth Amendment of the Constitution of the United States, are to be exercised by the Legislature of the State of Indiana for the benefit of the citizens of the State in light of the various local conditions and other local considerations; such sovereign powers are not to be exercised under threat, coercion, intimidation or undue influence by the United States.

25. Act § 503 and Act § 405 unlawfully interfere with the legislative process of the State of Indiana and the exercise of the sovereign rights of the State of Indiana, contrary to the Constitution of the United States and the Tenth Amendment.

26. Act § 503 constitutes an attempted purchase of the rights and sovereign powers of the states and the rights of the people by the United States contrary to the Constitution of the United States and the Tenth Amendment, and an attempt to amend and limit the Constitution of the United States so as to enlarge and enhance the delegated powers of the United States contrary to the Constitution of the United States and the Tenth Amendment, all to the irreparable detriment and expense of the State of Indiana and the people.

27. Title IV and Title V of the Act are contrary to the Tenth Amendment of the Constitution of the United States which reserved all, but specific delegated powers, to the states or the people, and contrary to the federal system required under the Constitution of the United States in that the United States in coercing, threatening, intimidating, and creating undue influence upon the states and the citizens thereof, including the State of In-

diana and its citizens and the governmental bodies thereof, including the Governor, the House of Representatives and the Senate of the State of Indiana.

28. The State of Indiana and its citizens cannot reasonably decide whether to enact the necessary legislation and to submit a state program under Act § 503, or whether to remain silent and allow the United States to administer a federal program under Act § 504, unless this Court declares which, if any, of the provisions of Titles IV and V can be validly exercised by the United States without legislation of the State of Indiana, and the lawfulness of the provisions which are coercive, intimidating and undermining to the sovereignty of the State of Indiana and its citizens.

26. Plaintiffs are being deprived of their property and rights without due process of law or without just compensation contrary to the Fifth Amendment of the Constitution of the United States and in particular:

a. Title V of the Act requires that Coal Company Plaintiffs reclaim land subsequent to surface coal mining activities to the extent of establishing such land's prior contour [§ 515(b)(3)], without the consent of such plaintiffs as to their own property interests, and such plaintiffs will be denied a permit pursuant to the Act, and their property rights will be rendered valueless unless they comply with the Act.

b. Title V of the Act requires that Coal Company Plaintiffs reclaim land subsequent to surface coal mining operations so that such land can be capable of supporting its prior use or a higher and better use [§ 515(b)(2)], all without the consent of such plaintiffs as to their own property interests, and such plaintiffs will be denied permits to mine land and their property rights will be rendered valueless unless they comply with the Act.

c. Title V of the Act requires that Coal Company Plaintiffs reclaim land so that it is capable of achieving prior productivity [§ 515(b)(7)], without the consent of such plaintiffs as to their own property interests, and such plaintiffs will be denied a permit and their property rights will be rendered valueless unless they comply with the Act.

d. Each of the foregoing require inordinate and confiscatory expenditures for equipment and increases in operating costs for Coal Company Plaintiffs to achieve such states of reclamation.

e. Title V of the Act allows permit applications to be denied based on proposed post mining uses [§§ 507, 508 and 510] so that plaintiffs' interests in their land will be rendered valueless.

f. Title V of the Act prohibits surface coal mining unless the above can be satisfied, and in other instances surface mining is prohibited as pursuant to Act § 522 and Act § 515(b)(12) so that plaintiffs' property interests will be rendered valueless.

g. The remaining provisions of Act §§ 507, 508, 509, 510, 515 and 516, as well as the foregoing provisions as set forth in a. through g., all require that Coal Company Plaintiffs change their procedures and expend inordinate and confiscatory amounts for capital and increased operating costs and expenses or be denied permits, in which event the property interests of such plaintiffs will be rendered valueless.

h. Each of the requirements of the Act as set forth above in subparagraphs a. through h. have no rational basis in relation to the ends, if any, which are constitutionally permissible.

i. There is no rational basis for the difference between the treatment of surface coal mining and other methods of mining coal under Act § 515(b)(12), § 515(b)(15)(C)(iii), § 402, and Title V.

j. Property of plaintiffs has been confiscated and rendered valueless as a result of the Act without payment or provision for payment of just compensation in violation of the Fifth Amendment to the Constitution.

k. Coal Company Plaintiffs in the course of developing mines to extract coal by the surface mining method, sometimes acquire the coal rights from the owner of the fee simple title by lease with the right to disturb the surface; and after the coal is removed, the surface is returned to the fee owner. The fee owner is paid for the coal by a royalty method of payment. By requiring the reclamation in the manner set forth in the Act, the cost of reclamation and the resulting increase in the value of the surface will inure to the benefit of the fee owner which benefit was not considered in the establishment of the royalty payment to the fee owner. The contracts and leases of the Coal Company Plaintiffs are thereby being impaired and the Coal Company Plaintiffs are being deprived of their property.

30. Act § 516 is unconstitutional and is contrary to the separation of powers and provisions of the United States Constitution and delegates power of Congress to administrative agencies without sufficient standards.

31. Act § 502(e) and § 517 are contrary to the Fourth Amendment of the Constitution of the United States in that the same allow and compel unlawful searches or seizures of plaintiffs' property.

32. Act § 518 of the Act is contrary to the Fifth Amendment of the Constitution of the United States in that due process is not accorded to plaintiffs herein if a violation occurs, since a hearing before an impartial tribunal and the opportunity to present evidence to such impartial tribunal are denied except on the prepayment of proposed penalties, all of which combine to create a

chilling effect upon the rights of plaintiff pursuant to the Fifth Amendment.

33. The penalties provided pursuant to Act § 518 are criminal penalties and plaintiffs are being wrongfully denied the right to a jury trial pursuant to the Sixth Amendment to the Constitution of the United States.

34. The "reclamation fee" assessed against Coal Company Plaintiffs pursuant to § 402 of the Act is discriminatory as against surface coal mining, contrary to the Fifth Amendment of the Constitution of the United States; and further such fee is in fact a direct tax on property and is not apportioned among the states based on population, contrary to the Constitution of the United States. Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4.

35. Act § 521(a)(1) which permits private citizens access to the private property of the Coal Company Plaintiffs constitutes an invasion of the constitutional right to privacy of such plaintiffs and is unconstitutional interference with the states' rights to define the laws of trespass as protected under the Tenth Amendment to the Constitution.

36. Act § 502(c) specifies those provisions of the Act which are to be in effect until a federal or state program is instituted.

37. Act § 502(c) does not specify that Act § 515(b)(7) is to be enforced during an interim period.

38. The defendants are attempting to enforce Act § 515(b)(7) contrary to their authority and the express provisions of the Act.

39. Coal Company Plaintiffs will have to comply with such provision and expend large amounts for capital and

incur substantial increased operating costs to comply with such section.

40. The Secretary of the Interior has promulgated regulations pursuant to Act § 501(b) without an environmental impact statement as required pursuant to the National Environmental Policy Act of 1969, specifically § 102(C) [42 U.S.C. 4332], and without otherwise complying with said act. The promulgation of regulations pursuant to Act § 501(b) constitutes a "major federal action" within the meaning of § 102(2)(c) of the National Environmental Policy Act.

WHEREFORE, plaintiffs pray that the Court grant (a) declaratory relief that Title V in whole or in part and Title IV as to Act § 402 are contrary to the Constitution of the United States as alleged, that the Secretary of the Interior has no authority to enforce such provisions, or that Act § 515(b)(7) is not a part of the interim program, that rules promulgated pursuant to Act § 515(b)(7) are major federal actions pursuant to NEPA, and that the Secretary of the Interior must comply with NEPA; (b) injunctive relief permanently enjoining defendants from enforcing any and all portions of the Act found to be unlawful, and a preliminary injunction enjoining defendants from enforcing the provisions of the Act as alleged; and (c) such other relief as may be proper.

ICE MILLER DONADIO & RYAN

/s/ HARRY T. ICE

/s/ G. DANIEL KELLEY, JR.

/s/ JAMES D. KEMPER

/s/ BYRON L. MYERS

Attorneys for Plaintiffs

[Filed: August 16, 1978]

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs in the above-consolidated actions, by counsel, [hereafter plaintiffs in No. IP 78-500-C are referred to as "State of Indiana", and plaintiffs in No. IP 78-501-C as "coal companies"], and pursuant to Fed. R. Civ. P. 65 respectfully move the Court for a preliminary injunction enjoining the defendants, and any and all persons functioning as officers, agents, servants, employees and attorneys of the defendants, and those persons in active concert or participation with them, from enforcing, in any way whatsoever, Title V of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87 [hereinafter "the Act"], 30 U.S.C. §§1251 through 1272, pending a full trial of these actions on the mertis.

In support of said motion plaintiffs show to the Court as follows:

1. Plaintiffs incorporate by reference the allegations made in their respective complaints in support of this motion as well as all exhibits being submitted herewith.

2. The surface coal minable reserves in the State of Indiana are located on the eastern edge of what is commonly termed the Illinois Coal Basin which area of surface minable reserves is located generally in southwestern Indiana [Exhibits 5, 1 and 2]. To the west of these surface minable reserves are located the underground minable reserves [Exhibits 5 and 3]. At the present time approximately 99.75% of the coal being produced within the State of Indiana is being produced by the surface mining method, and further approximately 82% of this coal being produced on a yearly basis is sold within the State of Indiana, which in excess of 80% is sold to electric utilities within the State of Indiana [Exhibit 6].

3. Most of the areas in which the surface mining is presently taking place within the State of Indiana and in which it is expected to take place in the future contain large amounts of "prime farmland" as defined under the Surface Mining Control and Reclamation Act, hereafter referred to as the Act, [Exhibits 2, 7 and 8]. The percentage of the land mined by Peabody in 1978 and which will be mined by AMAX through 1983 which is prime farmland is set forth on Exhibits 7 and 8.

4. The primary reclamation standards under the Act, including the permitting procedure, are attempts by the Federal Government to interfere with a traditional area of sovereignty of the State of Indiana, that of land use planning and control as follows:

a. The Federal Government will condition the approval of surface mining permits upon approval of subsequent land use [§507(g), §508(a)(2), (3), (4), (8), (10), §515, see Brief in Opposition to Motion to Dismiss, pp. 44-51], and the Federal Government will be required to approve any change in the postmining use from the premining use.

b. Specific reclamation provisions of the Act are related solely to asserted Federal land use policies, as the requirement of reclaiming surface mined land to a condition capable of supporting prior or higher or better mining uses [§515(b)(2)], returning the land to its original contour, [§515(b)(3)], removal and replacement of topsoil [§515(b)(3)] (sic), separate removal, segregation and replacement of the A Horizon, B Horizon, and C Horizon with respect to the prime farmland [§515(b)(7)], and the conditioning of any permit to mine upon prime farmland upon a showing of the technological capabilities to restore such land to equal or higher levels of productivity, and requiring of the applicant that the proposed postmining use be farming and that such use actually takes place [§510(d) and

see pp. 55 of Brief in Opposition to the Motion to Dismiss].

c. Designation of areas within the State of Indiana that would be unsuitable for surface mining, and the prohibition of mining operations in certain areas are solely related to land use control in §522.

5. Prime farmland extensively covers surface minable reserves within Indiana [Exhibit 2], and the requirements of the Act that the applicant demonstrate that prime farmland can be returned to 100% equal levels of productivity before an applicant is allowed to mine such land are impossible to comply with based on presently known technology and experience.

6. The excessive mining costs will result in restricting the development and expansion of the surface mining industry within the State of Indiana as well as ultimately result in closures due to the excessive mining costs [Exhibits 9 and 10].

7. The combined effect of the impossibility of restoring prime farmlands to original levels of productivity after surface mining and the excessive costs will displace all or part of the surface mining industry within Indiana and prevent future development of the mining and associated industries [Exhibit 11] and cause mining companies to seek to mine by the underground method, all contrary to proper land use control and planning.

8. The potential underground minable reserves within the State of Indiana are of such quality and located in such a fashion within the Illinois Coal Basin that the coal mining industry of Indiana could be shifted into mining by the underground method on underground mining reserves within the State of Illinois or within western Kentucky [Exhibits 12 and 6].

9. The prime farmland which is assertedly being displaced within the State of Indiana due to surface mining, is infinitesimal and unimportant under proper land use planning considerations within the State of Indiana as are presently being exercised by the State of Indiana by reason of:

a. The six primary counties within the State of Indiana where surface mined coal is extracted, those being the counties of Clay, Greene, Pike, Sullivan, Vermillion, and Warrick [Exhibit 13], contribute less than 5% of the total production of agricultural commodities as corn, wheat, soybeans [Exhibit 14].

b. The county government financial structure and the delivery of governmental services in such counties are highly dependent on the sustaining of and development of the surface mine industry and other related industries which locate in such counties due to surface minable coal reserves, and which industry contributes a significant portion of the personal and real property taxes paid in such counties. For example, the industry paid in 1978 the following percentage of the total real and personal property taxes paid in the following counties: Clay 7.3%, Green 6.4%, Pike 18.05%, Sullivan 14.3%, Vermillion 5%, and Warrick 50.4%. [Exhibits 15 to 19].

c. The Federal Government through the Agriculture Stabilization and Conservation Service in 1978 paid farmers within the State of Indiana not to produce such crops on 369,135.6 acres, [Exhibit 20].

d. A higher and better postmining use of the prime farmland under proper land use policies might be for purposes other than farming and the Act prohibits this.

10. The land use policies being implemented by the Federal Government through the Act could seriously disrupt and displace the delivery of governmental ser-

vices by the foregoing counties contrary to the land use planning and control decisions of these counties and the State of Indiana, all contrary to the Tenth Amendment of the Constitution of the United States. To the extent there is any valid basis for an exercise of the commerce clause power to control pollution aspects of the surface mining industry means less intrusive upon the sovereignty and retained powers of the State of Indiana are available, [Exhibit 21].

11. Plaintiffs are threatened with irreparable harm in the event that enforcement of Title V of the Act is not enjoined in that:

a. State of Indiana in order to retain exclusive jurisdiction over its land and land use control and planning is mandated to submit a state program to the Federal Government no later than August 3, 1979. Indiana presently does not have the laws necessary to have such a program submitted, and the General Assembly is presently convened until no later than April 30, 1979 but could adjourn earlier, and will not reconvene until January, 1980. The General Assembly cannot determine whether to enact such legislation to authorize the State of Indiana to submit a program from the standpoint of what is in the best interest of the State of Indiana and its citizens unless and until this Court declares and decides which provisions of the Act, if any, can be constitutionally imposed upon the surface coal mining industry and the State of Indiana. The Act is specifically drawn so as to be unlawfully coercive upon the States and their legislatures with the intent that the States will be compelled and unlawfully coerced into enacting legislation which would cure the constitutional infirmities of the Federal Act [Brief in Opposition to Motion to Dismiss, pp. 67-74].

b. The Department of Interior has not to date promulgated regulations for a permanent program so that the General Assembly cannot make an informed and reasonable decision in the interest of the State of Indiana and its citizens whether to enact legislation at the present time authorizing the State of Indiana to submit a permanent program.

c. The Secretary of the Department of Interior has violated the express mandatory duty placed upon him pursuant to §501(b) that:

> "Not later than one year after the enactment of this Act [August 3, 1977], the Secretary shall promulgate and publish in the Federal Register regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of Title V and establishing procedures and requirements for preparation, submission, and approval of State programs; and the development and implementation of Federal programs under the Title."

The time for the promulgation of permanent rules by the Secretary of the Department of Interior expired on August 4, 1978.

d. Such failure on the part of the Secretary of the Department of Interior is additionally coercive upon the State of Indiana and the General Assembly in that it becomes further impossible for the State of Indiana and the General Assembly to determine whether to enact legislation prior to August 3, 1979.

e. If the State of Indiana through the General Assembly does not enact legislation in the present General Assembly, it will be foreclosed from retaining control of its sovereignty in land use planning and control until after a Federal program is promulgated and adopted for the

State of Indiana which promulgation and development will begin by the Federal Government on August 3, 1979.

f. If the State of Indiana through the General Assembly acts under the present conditions of coercion and duress, it must either enact sufficient legislation without knowing the constitutionality of the Federal Act, and State of Indiana, its citizens, and coal companies will be barred by waiver from asserting questions as to the unconstitutionality of the Federal Act; or if the State of Indiana through the General Assembly does not act, it will be foreclosed for a period of at least two to three years from retaining jurisdiction and authority to regulate land use control and planning in the State of Indiana through the surface mining activities.

g. The State of Indiana through the Department of Natural Resources is being required to divert funds from its selected manner of delivering the State governmental services, to the extent of Two Hundred Fifty-Six Thousand Five Hundred Seventy-Eight Dollars ($256,578.00) on a yearly basis and the administrative officers of the Department of Natural Resources are now required to divert approximately 20% of their normal time to matters arising under the Federal Act which expenditure of time was not chosen for them as a matter of State policy in the delivery of the governmental services to its citizens, but rather all due to the coercion and duress applied against the State of Indiana by the Federal Government [Exhibit 22].

h. The State of Indiana is also suffering irreparable harm by the enforcement of the Act upon the State's coal producers since the State is a major consumer of coal and coal-generated electricity and steam. For the fiscal year 1976-1977, various State institutions used 393,434.37 tons of coal at a cost of $9,198,059.14 to the State. For the fiscal

year 1977-1978 (year of the coal strike), the various State institutions used 338,680.57 tons of coal at a cost of $9,035,662.70 to the State. During the fiscal year 1978 to approximately February 1979, the various State institutions have used 246,777.35 tons of coal at a cost of $7,497,599.24 to the State. The average cost per ton to the State was: 1976/1977—$23.38; 1977/1978—$26.68; 1978/ approximately February 1979—$30.38 [Exhibits 23-27]. Besides its direct consumption of coal, which is becoming more expensive because of the requirements placed upon coal producers by the Act, the State of Indiana is also an indirect consumer of coal through its purchase of electricity, [Exhibit 28].

i. The State of Indiana is facing current and future irreparable harm to its policy-making in land use control and planning, and in the delivery of its governmental services, all traditional areas of state sovereignty. Unless the enforcement of the Act is enjoined pending a full resolution of the merits, the State of Indiana is, and will continue to be, placed in a position where the State will be forced, by the terms of the Act, to either accept the Federal Goverment's land use policy as the State's policy for Indiana land, or lose entirely its jurisdiction over land use planning and control of Indiana land on which surface mining is to be done to the Federal Government.

j. Plaintiff coal companies have incurred and are continuing to incur substantial costs in complying with the unlawful provisions of the Act. In 1978, AMAX Coal Company expended in excess of Twenty-Seven Million Dollars ($27,000,000.00) in purchasing capital equipment to comply with the Act [Exhibit 29] as well as an additional Eight Million One Hundred Thousand Dollars ($8,100,-000.00) increased cost of operation for the four Indiana mines alone [Exhibit 9]. Unless this Court enjoins enforcement of the Act as requested,

AMAX will have to spend an additional Five Million Dollars ($5,000,000.00) for capital equipment in 1979 [Exhibit 30], and will further have to expend well in excess of Eight Million Dollars ($8,000,000.00) increased operating costs during 1979 [Exhibit 9]. Peabody has and will incur substantially similar capital expenditures or additional cost and expenses. If the Act is ultimately declared unconstitutional as requested, none of the cost and expenses incurred above are recoverable from the government and serious and prejudicial injury and harm will result to these plaintiffs.

k. Plaintiff AMAX has already closed one mine in southern Indiana causing the loss of employment opportunities and loss of revenue to the county governments in part due to the additional cost and expenses and burdens placed upon such mine by the Federal Act, all to the damage and injury of plaintiff AMAX for which it has no adequate remedy, [Exhibit 10].

l. Plaintiff AMAX has payed to the Federal Government in excess of Ten Million Dollars ($10,000,000.00) in 1978 due to the tax placed upon it by §401 of the Act and will have to continue to make such expenditures during the year 1979 probably in excess of that incurred during 1978, all to its irreparable damage unless the Court presently enjoins enforcement of the Act including the tax, [Exhibit 9]. Plaintiff Peabody has similarly paid and will continue to be forced to pay such amounts.

m. Plaintiff coal companies are presently and will continue to be mining upon prime farmland as defined by the Secretary of Agriculture within the State of Indiana [Exhibits 7 and 8]. There is presently no known technologically possible methods to return prime farmland to original levels of productivity. There were no such methods known or available at the time of the

enactment of the Act. Plaintiff coal companies must begin submitting applications for permits at the end of April, 1979 in which permits, the Federal Government may require a showing of technological capability to return the land to original and equal levels of productivity in which event plaintiff coal companies will be barred from conducting mining operations on such prime farmland. Such prime farmland is interspersed throughout the areas to be mined such that it is not economically feasible to continue mining operations if such prime farmland cannot be mined and plaintiff coal companies in the event of such actions by the Federal Government will be prohibited from conducting mining operations which will render the coal reserves owned or leased by the coal companies valueless, contrary to the Fifth Amendment of the Constitution of the United States.

12. Plaintiffs have no adequate remedy at law.

13. Plaintiffs are likely to prevail at the trial of this action. As more fully shown in Plaintiffs' Briefs In Opposition to the Motion to Dismiss, this lawsuit draws the constitutionality of the Act into serious doubt under the Commerce Clause, the Tenth Amendment, and the Fifth Amendment. The Act is an unconstitutional usurption of the powers reserved to the States with respect to land use control and planning, a traditional area of state sovereignty, and cannot stand as a valid exercise of the commerce power because there is no rational relationship between the facets of surface mining regulated and the adverse effects of surface mining on air and water quality sought to be eliminated, upon which relationship the validity of the Act depends; or at the very least there are manners less intrusive upon state sovereignty which are available to protect any legitimate Federal interest [Exhibit 21].

14. The issuance of a preliminary injunction with respect to Title V of the Act will not impose an undue burden or hardship on the defendants.

15. The issuance of a preliminary injunction of the scope sought by the plaintiffs will be in the public interest and the status quo before the Act should be preserved in that:

a. The Indiana legislature will be able to decide whether to exercise its authority with respect to the implementation of a state program with full knowledge of the manner by which the Federal Government can constitutionally regulate surface coal mining and reclamation operations within the State of Indiana, and will not be unlawfully coerced into enacting legislation which would cure the constitutional infirmities.

b. The citizens of the State of Indiana will be afforded the right to be regulated by the state officials elected for that purpose, and will be afforded the benefit of their legislative machinery, without the unlawful coercion attempted by the Act.

c. It will prevent the loss of jobs, as was the result of the closure of the Ayrcoe Mine, by reducing the likelihood of the closure of other mines; and it will avoid the blight that will otherwise result with respect to future coal mining operations in Indiana, which would in turn displace present State land use policies and displace State policies concerning the delivery of governmental services.

WHEREFORE, said plaintiffs pray that the foregoing Motion be granted and that the Court enjoin:

1) the enforcement, except as to federal lands, of §402(a) [30 USC §1232(a)] and Title V [30 USC §1251-1281] and all regulations promulgated thereunder; or

2) the enforcement of §502(b) and (c); §503, §504, §505, §506, §507, §508, §509, §510, §511, §512, §513, §515(a), (b)(2), (3), (5), (6), (7), (8), (12), (15), (16), (17), (18), (19), (20), (23), (24), §518, §521, §522, and §402(a), or any parts thereof and all regulations promulgated under any of the sections, or

3) at the very least the Federal Government from promulgating a federal program for Indiana until after June 30, 1980, or until 60 days after the conclusion of the first convening of the General Assembly of the State of Indiana after this Court renders a final decision on the merits, and further that this Court mandate the Secretary of the Department of Interior to treat Indiana in all respects as though such a date were the date established by §504(a) and §503 as the latest time for a state to submit a proposed state program; and

4) such other and further relief as is proper in the premises.

/s/ G. DANIEL KELLEY, JR.

/s/ BYRON L. MYERS

ATTORNEYS FOR PLAINTIFFS,
INDIANA COAL ASSOCIATION, *et al.*

THEODORE L. SENDAK
Attorney General of Indiana

/s/ DONALD P. BOGARD
Chief Counsel

/s/ JANE M. GOOTEE
Deputy Attorney General

[Filed: March 9, 1979]

JOINT PETITION FOR EXPEDITED TRIAL AND DECISION AND STIPULATION AS TO PROCEDURE

The parties in the above consolidated actions, by counsel, respectfully petition the Court for an expedited trial and decision in these cases, and in order to facilitate the same and reduce the issues, stipulate and agree as follows:

1. Because of the significant constitutional issues involved in these actions, it is to the benefit of each party that a decision on the merits be rendered as soon as possible, and particularly as early as possible in the 1980 session of the Indiana General Assembly.

2. As to the pending motion of plaintiffs for a preliminary injunction, the parties stipulate and agree that the Court need not decide the same and may proceed to a final disposition of the issues subject only to the Court's having taken defendants' motion to dismiss under advisement and that the allegations of the motion for preliminary injunction shall be taken as being a part of the complaints.

3. To conserve the time and effort of the Court and to expedite the final resolution of these proceedings, the parties stipulate and agree that coal industry plaintiffs withdraw the following issues from these actions without prejudice to raising such issues in other actions:

a. Rhetorical paragraph 31 of the complaint concerning the search and seizure issues.

b. Rhetorical paragraph 33 concerning the Sixth Amendment issues.

c. Rhetorical paragraphs 36, 37, 38 and 39 concerning whether § 515(b)(7) should be enforced during the interim program.

d. Rhetorical paragraph 35 concerning § 521(a)(1) permitting private citizens access to private property.

e. Rhetorical paragraph 40 concerning the NEPA issues.

f. That part of the request for relief relating to the withdrawn allegations.

4. In the interest of judicial economy and for the convenience of the Court, the parties further stipulate and agree that the exhibits and affidavits filed in support of, in opposition to and/or in response to defendants' motion to dismiss [motion for summary judgment] and plaintiffs' motion for preliminary injunction, and the testimony and other evidence presented at the hearing on the foregoing motions held on April 18, 1979, be made a part of the record and considered by the Court as the evidence in the trial on the merits with the only additional evidence being plaintiffs' Exhibit 45 attached hereto[1] as to which defendants have no objection.

5. The parties further stipulate and agree that the time for further briefing on the merits of this action shall be ten (10) days for the plaintiffs' brief, which time shall begin to run from the date of the Court's Order Entry on this petition, that defendants shall have ten (10) days from and after the filing of plaintiffs' brief to file a responsive brief, and that plaintiffs have five (5) days after the filing of defendants' brief to file reply briefs.

6. The parties further agree that if the Court desires, an oral argument can be held after the briefs have been filed.

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[1] The relevant portion of plaintiffs' Exhibit 45 is set forth at p. 102 *infra*.

WHEREFORE, the parties pray that the Court grant this joint petition for expedited trial and decision and approve the stipulation as to the procedures.

ATTORNEYS FOR PLAINTIFFS,
INDIANA COAL ASSOCIATION, *et al.*

/s/ G. DANIEL KELLEY, JR.

/s/ BYRON L. MYERS

ATTORNEYS FOR PLAINTIFFS
STATE OF INDIANA, *et al.*

/s/ JACK O'NEILL
Deputy Attorney General

ATTORNEY FOR DEFENDANTS

/s/ HAROLD R. BICKHAM

[Filed: February 27, 1980]

EVIDENCE

Plaintiffs' [Appellees'] Exhibits[2]

Plaintiffs' Deposition Exhibit 3
To Deposition
Of R. Neil Sampson

Report of the
Interagency Task Force on
the Issue of a Moratorium or
a Ban on Mining in Prime Agricultural Lands

prepared by:
Office of Management and Budget
Soil Conservation Service
Bureau of Mines
Federal Energy Administration
U.S. Environmental Protection
Agency

The issue of imposing either a moratorium or a ban on prime farmlands arose in February, 1977 during the interagency review of proposed amendments to the surface mining legislation. Those agencies expressing a need for a moratorium on mining on prime farmland based their view on two studies on the effects of surface

[2] The exhibits and testimoy set forth herein was presented at the hearing on plaintiffs' Motion for Preliminary Injunction and defendants' Motion to Dismiss held on April 18, 1979. By stipulation of the parties, see p. 49 *supra*, the Court ordered that such exhibits and testimony be made part of the record and considered by the Court as the evidence in the trial on the merits.

mining on prime farmlands in Illinois, one of which was funded by the Department of Health, Education, and Welfare, and the other conducted by Jack Doyle of the Environmental Policy Center.

These studies indicated essentially:

- there are serious questions as to whether high capability agricultural lands strip mined for coal can be returned to their original capacity within an acceptable period of time. The test is not merely showcase growth but productive quality yields on a sustained basis and on a par with the full agricultural value of whatever grew there before mining.
- the problems with the Illinois Mined Land Conservation and Reclamation Act and Rule 1104 (Lands To Be Reclaimed For Row Crop Agriculture) is that nowhere in the law or the regulations are either pre-mining agricultural productivity or pre-mining agricultural yields referenced. Additionally, the Illinois strip mine law contains no provision for designating productive agricultural land as unsuitable for strip mining. As a result, the law encourages the direct and indirect loss of agricultural land through variance procedures and allowances for less productive restoration such as from row-crop use to pasture use.
- once areas in Illinois have been mined, they generally are not returned to intensive agricultural purposes, but rather the land uses generally change to urbanization, highways, and pasture-land.
- So long as there are deep mineable coal reserves in the quantities found in Illinois, there is no need to gamble away long term productive agricultural capacity at the hand of the short-term mining economies.

As a result of the findings expressed in the two studies, an interagency task force was convened to examine the particular issues of

- assurance that the productivity of soil can be restored after mining in prime farmlands
- the impact of a moratorium or ban on coal production reserves, and electric power generation
- the impact on land availability for food production if mining were allowed to continue on prime farmlands.

Prime Farmlands: The Situation[1]

The Department of Agriculture has been deeply involved in this issue for the past few years. In October 1975, the Soil Conservation Service adopted a definition of prime farmland to provide some consistency across the Nation. Prime farmland is defined as the land best suited for producing food, feed, forage, fiber, and oilseed crops. It has the soil quality, growing season, and moisture supply to produce sustained high yields of crops, economically, whenn (sic) treated and managed according to modern farm methods. Prime farmland, is the farmland that gives highest yields with minimum inputs of energy or capital, and with the least damage to the environment in the process. It is the land which can be foarmed (sic) for generations with sustained high yields with proper management.

In 1975, the Soil Conservation Service conducted a Potential Cropland Study to evaluate the status of the

[1] Notes on presentation by R. Neil Sampson, Soil Conservation Service, at Congressional Research Service Workshop on Agricultural Land, Washington, D.C. February 3, 1977. (Footnote in original.)

Nation's croplands and the potential to bring additional land into production. The study was done by re-sampling a selected group of the 160-acre sample plots used in the 1967 Conservation Needs Inventory. This provided a statistically valid sample at the National and Farm Production Region level as illustrated in Figure 1. In addition, it also provided data on the amount and current use of the Nation's prime farmland. Comparisons of the current land use on the sample plots with their 1967 use identified the land use change over the 8-year period between the two surveys.

The Potential Cropland Study results indicate a total of 384 million acres of prime farmland in the United States. About 65% of this land is cropland or 250 million acres. Thus, prime farmland accounts for 62% of the 400 million acres currently cropped in the United States. Of the 134 million acres of prime farmland not now in cropland, 24 million acres have a high potential for conversion to cropland with no developmental problems. Another 15 million acres have a high potential for conversion to cropland but will require added investment to overcome problems. An additional 9 million acres have medium potential for conversion to cropland, but with more severe problems. Finally, 86 million acres have low to zero potential for conversion because of serious developmental problems. . . . [Pages 1-2.]

* * *

Regional Status of Prime Farmlands

The United States is divided into ten Farm Production Regions. Of these ten regions, the Corn Belt region has the largest acreage or 77 million acres of prime farmland. The Northern Plains regions is second with 72 million acres of prime farmland followed by the Southern Plains with 67 million acres. The three regions

with the smalles (sic) acreage of prime farmlands are the Pacific region with 14 million acres and the Northeast and Mountain regions, each having approximately 18 million acres.

For prime farmland cropped, the Corn Belt region leads the Nation with 61 million acres, followed by the Northern Plains and Lake states with 58 and 30 million acres respectively. The Southease (sic), Northeast, and Pacific regions have the lowest acreages of prime farmland being cropped with about 9 million acres each. Distribution of total cropland, total prime farmland, and prime farmland cropped in the United States is provided in Table 2.

Table 2

Distribution of Total Cropland, Total Prime Farmland and Prime Farmland Cropped in the United States

Farm Production Region	Total Cropland (million acres)	Total Prime Farmland (million acres)	Prime Farmland Cropped (million acres)
Appalachian	20.3	26.4	13.2
Corn Belt	86.7	76.9	61.2
Delta States	20.2	29.6	15.2
Lake States	44.1	38.4	30.4
Mountain	40.6	18.1	15.7
Northeast	17.3	17.9	8.9
Northern Plains	90.8	72.0	58.1
Pacific	21.9	13.8	8.9
Southeast	16.5	23.6	9.0
Southern Plains	41.0	67.2	29.2
United States	400.	384.	250.

Production from Prime Farmlands

Around 66% of the 1975 crops of grain, corn, soybeans, wheat, cotton and feed grains were grown on prime farmland. Nearly all of the cotton was grown on prime

farmland or 89%. Of the other crops, 75% of the corn harvested as grain, 70% of the soybeans, 61% of the feed grains, and 54% of the wheat was grown on prime farmlands. Yields from prime farmlands are substantially higher than those from non-prime lands and are illustrated in Table 3. [Page 4.]

* * *

Loss of Prime Farmland

A total of 23 million acres have been converted to urban and water uses during the period from 1967 to 1975. This represents an average of three million acres per year converted to these uses during that period. The greatest losses are in prime farmlands as illustrated in Table 5. An annual average of one million acres of prime farmland was converted to urban and water uses during this period. Another one million acres of non-prime land in classes II through IV were also converted each year. Of the 8 million acres of prime farmland lost to urban and water uses, 6.5 million acres were converted to urban uses and 1.5 million acres to water or 80% and 19% respectively.

* * *

The United States has ample farmland to meet its domestic needs for the foreseeable future. However, there are some persons who believe that there exists an ethical responsibility to retain as much as possible the existing farmlands of this Nation. In their view there is a humanitarian aspect of this problem and they believe that every acre of prime farmland that goes out of production represents loss of food stocks which could be made available to people in less developed areas of the world. This view generally does not recognize the issues associated with getting the food from the United States

to those needy in other countries, e.g., transportation costs, foreign limitations of the less developed countries, and the views of other countries exporting agricultural products. [Page 6.]

* * *

Arguments on the issue of whether prime farmlands can be reclaimed to their original level of productivity.

A. Arguments suggesting that prime farmlands can be reclaimed to their original level of productivity.

- For several years, experts have encouraged making a decision before mining is done as to the intended use of the land after mining. Plans are made for grading and other operations needed for the intended land use. Generally, the land use selected is a low intensity use for which little care in placement of the spoil is needed. As a result, a site barely suitable for the intended use is created, with a soil having a productive capcity or use potential much lower than that which might have been constructed if the soil materials had been placed in the proper sequence. For many areas, it is possible to construct soils with use potential even higher than that which had existed before mining. The only State that now requires separation of A and B horizons and proper sequencing for soil placement is North Dakota. Studies there indicate that prime wheatland can be reclaimed to original levels of productivity.
- Studies reported by McKormick, of the Soil Conservation Service in eastern Ohio, and southwestern Pennsylvania, utilizing soil reconstruction methods, indicate that soil reconstruction can full (sic) restore or, in many areas, actually improve the productive capacity of mined lands.
- The German experience.
- Steps needed in soil reconstruction in order to achieve these results are as follows:

1) Obtain detailed soil survey of proposed area of surface mining to determine properties of each soil horizon.
2) Determine by testing, or by general information in the area, the nature of each geologic stratum above the coal. Use this information to identify toxic or otherwise objectionable strata that should be buried and to identify properties of the mixture of strata likely to be produced by the proposed mining technique.
3) Evaluate the comperative quality of the B horizon of the natural soil and the mixture of geologic strata to be produced by mining and choose the best material for the subsurface layer of the reconstructed soil.
4) Remove and stockpile separately the entire A horizon of the natural soil.
5) Where it is shown to be most favorable for the reconstructed soil, excavate and stockpile separately material from the B horizon of the natural soil according to plans for mixing (or keeping separate) selected portions of the B horizons to provide a favorable subsurface horizon of uniform thickness throughout the area to be surface mined, i.e., on all the soil series that occur.
6) Carry out mining operation, carefully burying all objectionable strata.
7) Grade spoil to planned land configuration.
8) Regrade the material from the B horizon over the graded spoil to the planned thickness to form the subsurface horizon of the reconstructed soil.
9) Regrade the A horizons over the subsurface horizon in a uniform thickness.
10) Seed as soon as grading is completed.

° The soil requirements of a productive soil are well known to soil scientists and agronomists. The properties of the soil at the site of surface

mining can be accurately determined before mining from soil surveys. If the soil horizons are carefully stockpiled and returned to the graded spoil in proper sequence after mining, the productive capacity of most soils will be restored within a few years. Care will be required in excavation and handling to assure (a) that the soil horizons are properly identified, (b) that the A and B horizons be excavated selectively and stockpiled separately, and (c) that erosion and contamination of the stockpiled soil materials from these horizons be prevented. Also care will be required in replacing and regrading these soil materials after mining to assure that material from each horizon is graded over the area in uniform thickness, that the soil materials be replaced in proper sequence, and that overcompaction or puddling are avoided and proper soil compaction is achieved.

- If the operational capability outlined above can be assured, the productive capacity of the soil that existed before mining can be restored in a reasonable time.

B. *Arguments suggesting that Prime Farmlands cannot be Reclaimed to their Original Level of Productivity*

- While there are theories and proposals for proper land reclamation there is no demonstration to date which shows that prime farmland used for row crops such as corn and soybeans can, after having been reclaimed after strip mining, give equivalent crop performance. No tests like that have yet been made in Illinois. Because of this 22 projects will be getting underway through USDA Cooperative State Research Service to demonstrate the proper recovery procedures and the best crop production possible. For example, the University of Illinois is starting a 5-year experimental pro-

gram on two tracts with different geological strata. The plots in these tracts will be laid out and prepared in the summer of 1977. First crops will be grown in 1978. Allowing for break-in period, normal crop rotation and fluctuations in the weather, 5 years are needed to assess land capability.

Dr. Ivan Jansen, agronanist (sic) in charge of the University of Illinois program will study the following:

- Soil character - particle size, structure, density, chemical properties, compaction.
- Soil organisms - population can decline markedly during mining and reclamation procedures and may take years to recover.
- Root development in virgin and reclaimed soils. Barriers to root development will be noted on roots dug up.
- How different mining techniques change character of soil as related to premined landscape and geological column.
- Hydrological characteristics of the reclaimed soil and the water table. Reclaimed land has less water holding capacity and permits less water infiltration and causes more of rains to run off. Irrigation will be used if intermittent dry spells cause this handicap to prevent adequate growth. These problems are largely caused by compaction in piling and spreading the soil layers with rubber tire equipment. The study will determine how soon compaction will be overcome and whether planting grass and legumes will be necessary to loosen the soil.
- Variations in thickness of A and B horizon topsoils will be studied versus crop performance.

If recovery tests are successful during the moratorium, and previous studies give hope that they

will be, then prime lands may be strip mined provided they are recovered by sound procedures. If tests are not successful, then prime farmlands will have been preserved instead of degraded. This is consistent with USDA policy that prime farmlands should be preserved and with the EIS requirements to evaluate proposed changes to prime farmlands in Federal programs.

° Even after this experimental work has been completed, it still isn't known whether the productivity levels can be obtained. At this time, estimates of the time frame required to achieve expected productivity may be 10 to 30 years. [Pages 9-12.]

* * *

A ban on surface coal mining, summarized nationally by major coal region in the U.S. provided in Table 2, would result in:

° Annual production impacts of 74.3 million tons, or 18.6% of strip mining production, or 10.1% of the total U.S. coal production in the first year of enactment. Total prime farmland involved would be 21,800 acres or .006% of total prime farmland.

. . . .

° In the Illinois, Southeastern Indiana, Western Kentucky coal fields, where the impacts are likely to be the most severe, annual production impacts of 44.5 million tons, or 49.4% of strip mining production in those States and 10 billion tons of strippable reserves in those States would be experienced in the first year. Prime farmland involved would be 13,800 acres, or .0005% of total prime farmland. [Pages 17-18.]

* * *

If mining were permitted to continue on prime farmlands,

- Annual prime farmland disturbed would be 21,800 acres, or .006% of the total prime farmlands based on current levels of production. This amounts to less than .006% of all prime farmland acreage under cultivation of all crops in 1976. Even if the entire 21,800 acres were assumed to come out of corn production, the projected U.S. corn production in the 1976/77 crop year would be less than .04%.

A moratorium on surface mining with a grandfather clause for existing mines would result in:

- No coal production losses from existing mines but from planned new production scheduled to come on line *within the first year of enactment*, 10.4 million tons or 9.2% of new production would be affected. These impacts are understated because they do not include second, third, and fourth year impacts. Planned new production for 1978 and 1979 will also be affected. Coal production impacts for 1980 and beyond will not be as significant as those experienced in the earlier years as coal production shifts to non-prime lands.
- Reserve losses would be the same as those experienced under a ban during the period of the moratorium.

Finally, it should be noted that in an analysis completed last year by an eminent agricultural economist, Earl Heady of Iowa State, in cooperation with USDA and Interior, it was found:

- that the supply of U.S. farmland will be adequate to meet domestic needs and provide supplies for export through the year 2000.
- though the adequacy of food supply was found to vary according to different assumptions about export levels and conservation standards for land and water, availability of farmland was not a serious constraint in any of the scenarios analyzed.

The Economic Research Service currently reports, for example, that ending stocks of wheat in the U.S. will increase wheat from 339 million bu. in 1973/74 to 1,095 million bu. in 1976/77. For the same period, ending stocks of rice are projected to increase rice production from 7.8 million cwt. to 49.6 million cwt., and ending stocks of feed grains will result in an increase of the same from 23.7 short tons to 27.3 short tons. [Pages 18-19.]

* * *

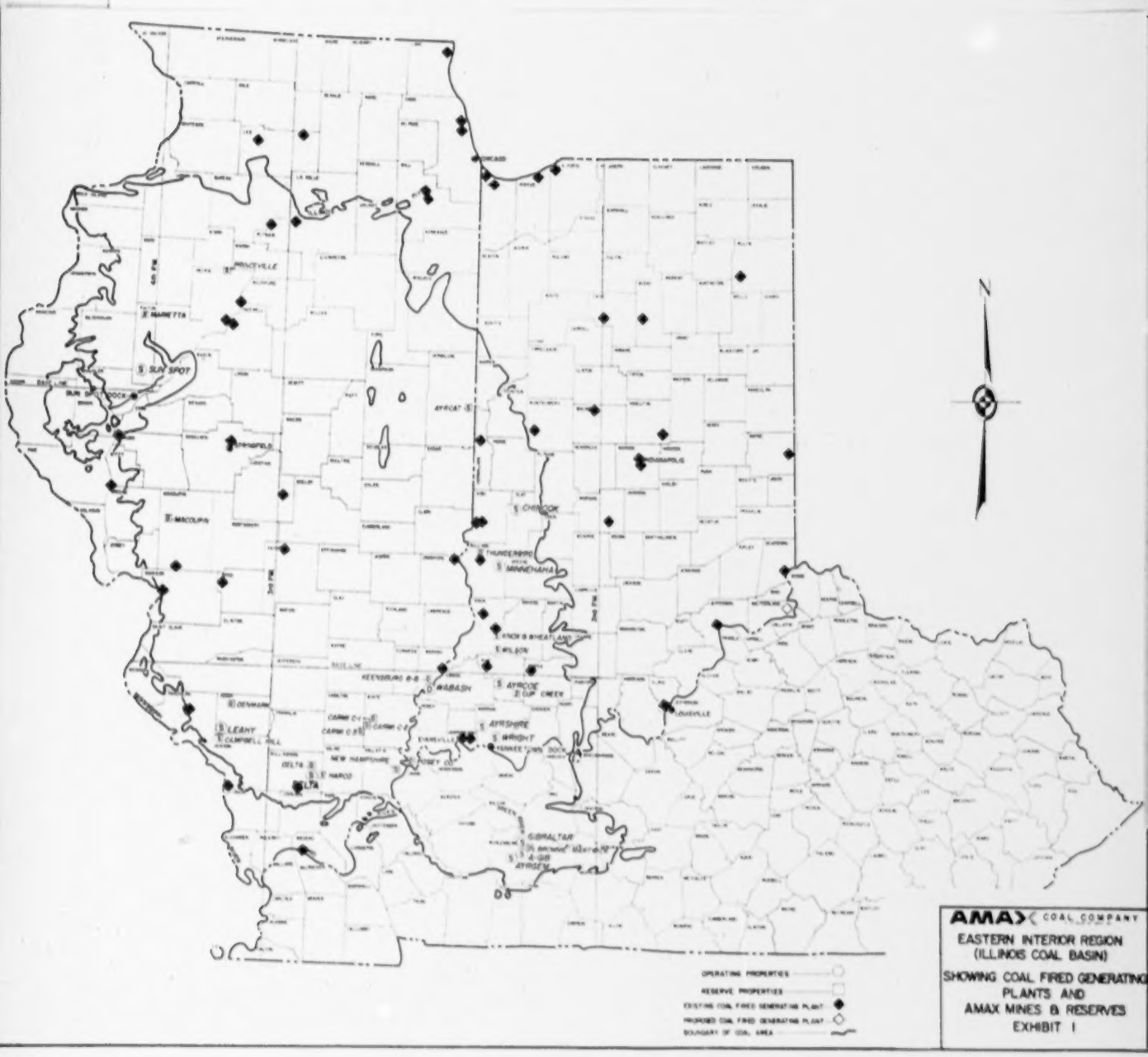
Summary Impacts on Long Term agricultural capacity if no moratorium or ban is imposed

° The fact that some prime farmland will be taken out of production for a period of time, or will be able to support diminished production levels for an additional period, should be balanced against the social utility of mining the strippable coal reserves underlying that land. As a practical matter, the economic balance is not really at issue. If one assumes that the market price of a given commodity bears some relationship to its economic and social value to society, the social investment decision for most of the Nation's coal fields will almost always favor the coal. In the most simple terms, the fact is that the price utility and other major coal users are willing to pay for the resource will normally far exceed the long term income potential of a given plot of land for agricultural production.

Capitalized at 5%, the value of an acre of prime farmland for agricultural production will generally not exceed $600 in Illinois. This assumes a long term net return for corn production of approximately $.25 per bushel at sustained yields of 120 bushels per acre. This compares with an average return of at least $12,000 -

$18,000 per acre for surface coal production in Illinois assuming a net return of $2-$3 per ton at an average recovery factor of approximately 6,120 tons per acre.

° With regard to food production impacts, even assuming a worst case senario (sic) in which the entire 13,800 acres of prime farmland annually affected by surface mining in the Illinois, Indiana, Western Kentucky coal fields were lost permanently to farm production, total acreage losses over a 30 year period would amount to 414,000 acres. Further assuming that the entire impact of the loss would be on corn production, the total production loss in the 30th year would be less than 1% of national 1976/1977 yields. [Page 21.]

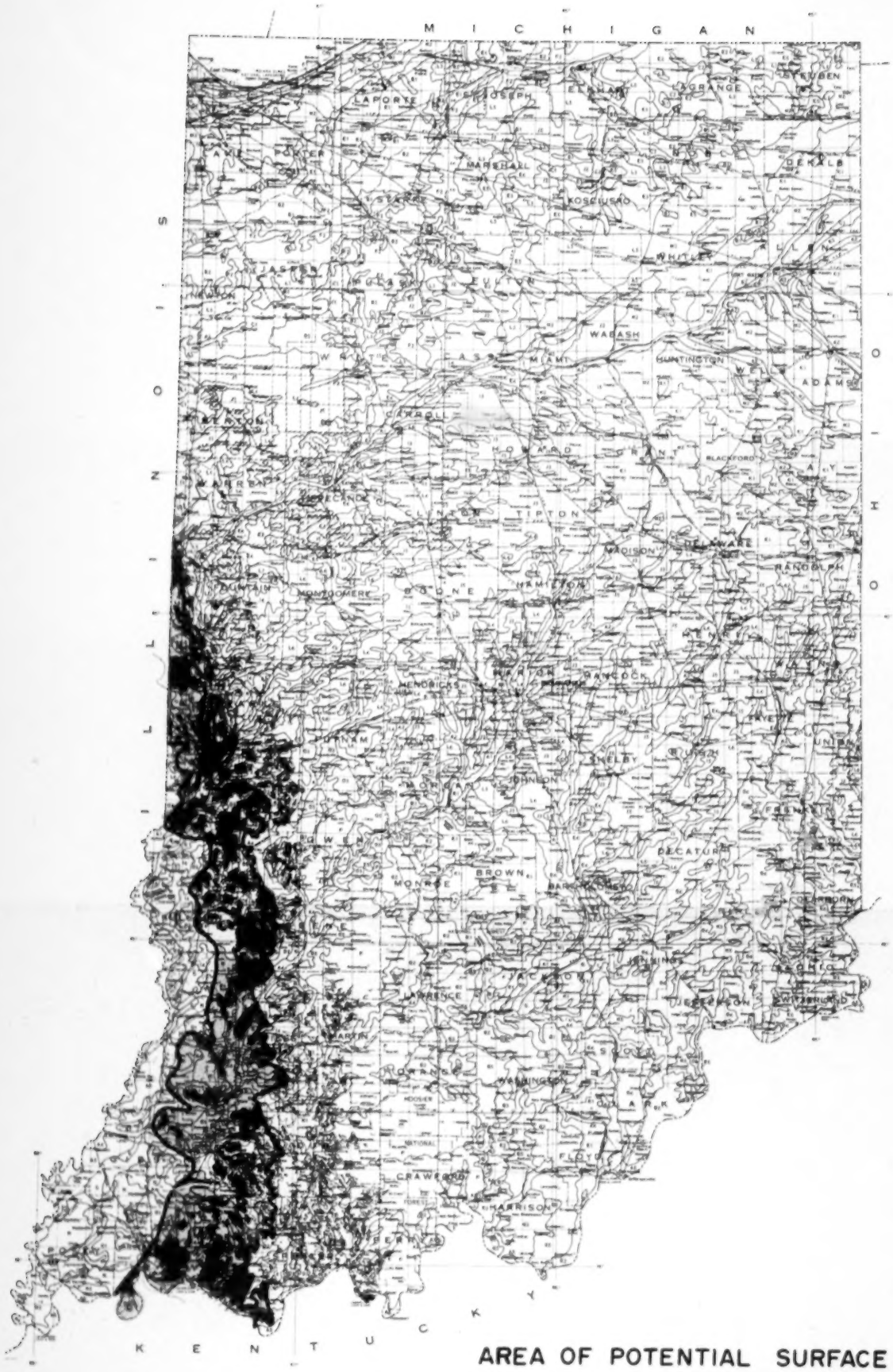


AMAX COAL COMPANY

EASTERN INTERIOR REGION
(ILLINOIS COAL BASIN)

SHOWING COAL FIRED GENERATING
PLANTS AND
AMAX MINES & RESERVES

EXHIBIT 1


M I C H I G A N
I L L I N O I S
O H I O
K E N T U C K Y
LAPORTE
ST. JOSEPH
ELKHART
STEUBEN
LAGRANGE
DEKALB
MARSHALL
KOSCIUSKO
WHITLEY
WABASH
HUNTINGTON
ADAMS
CARROLL
HOWARD
BLACKFORD
TIPTON
MADISON
DELAWARE
RANDOLPH
MONTGOMERY
BOONE
HAMILTON
HENDRICKS
MARION
HANCOCK
SHELBY
JOHNSON
UNION
FRANKLIN
DECATUR
BROWN
MONROE
JENNINGS
RIPLEY
DEARBORN
OHIO
LAWRENCE
SWITZERLAND
WASHINGTON
CRAWFORD
HARRISON
N
AREA OF POTENTIAL SURFACE MINING
AND
LOCATION OF PRIME FARMLAND
AREA OF POTENTIAL SURFACE MINING
MINED OUT AREAS
EXHIBIT 2

AREA OF
POTENTIAL
UNDERGROUND MINING

MINED OUT AREA

AREA OF POTENTIAL
UNDERGROUND MINING

EXHIBIT 3

PRIME FARMLAND OF INDIANA

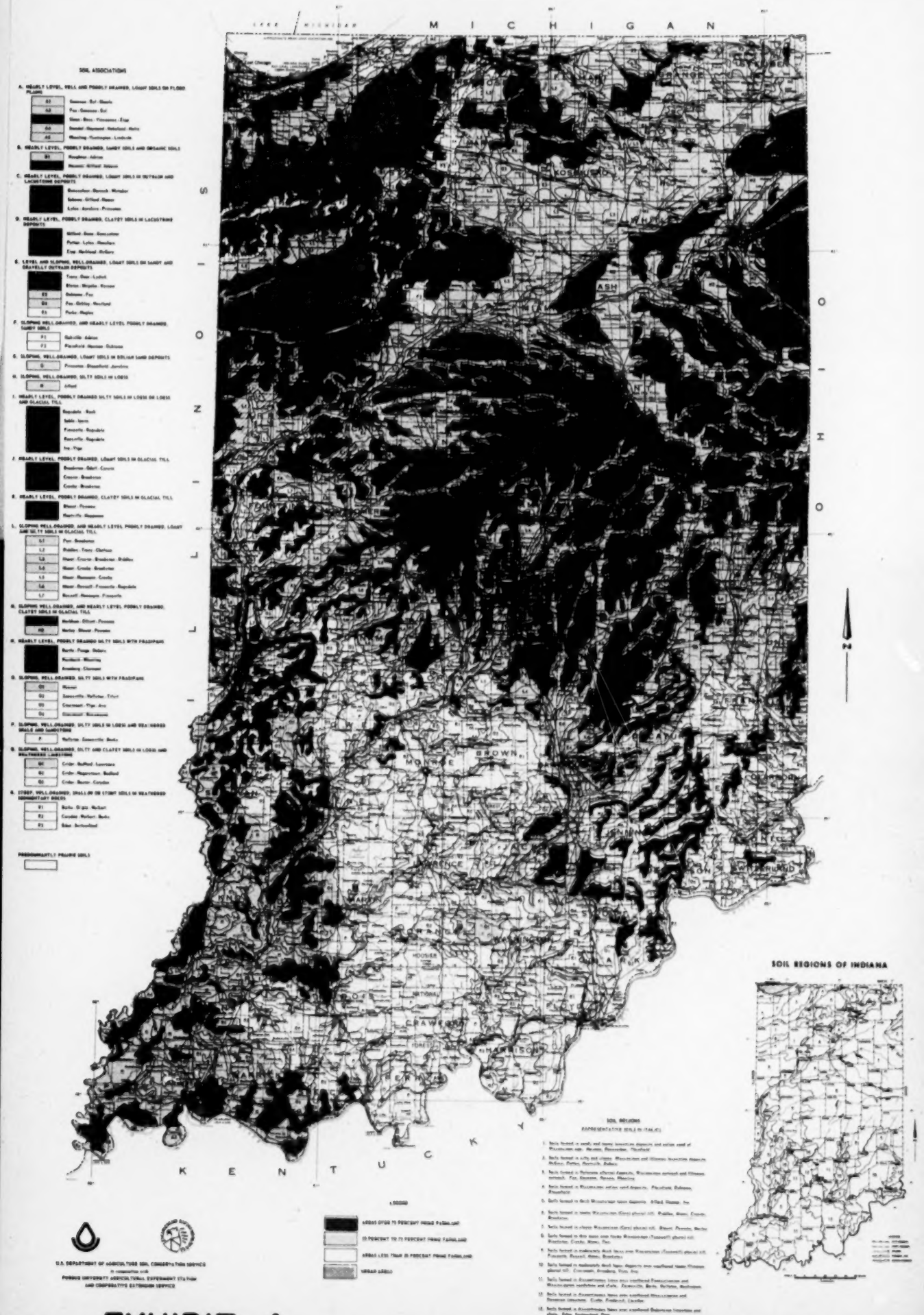


EXHIBIT 4

EXHIBIT 5

AFFIDAVIT OF CHARLES E. WIER

Charles E. Wier, being first duly sworn, states:

1. I am employed by AMAX Coal Company, a Division of AMAX Inc. in the position of Senior Manager-Exploration.

2. I received a Ph.D. in 1955 from Indiana University in Economic Geology. I was employed jointly by the Indiana Geological Survey and the Department of Geology and when I left these employments in 1974, I held the positions of Head of the Coal Section of the Indiana Geological Survey and was Professor of Geology in the Department of Geology at Indiana University. Thereafter, I was employed by AMAX Inc. in the International Group in coal and diamond exploration in Africa. In March 1976, I became employed by AMAX Coal Company in my present position. I have authored 30 professional publications concerning Indiana coal and in my employment, I had direct experience in the accumulation and distribution of data concerning coal in the State of Indiana.

3. Based on my educational background, and my work experience within the State of Indiana, I have had prepared subject to my direction and control Exhibits 1, 2 and 3.

4. Exhibit 1 sets forth by the heavy dark boundary, the Eastern Interior Region of coal reserves within Illinois, Indiana and western Kentucky. This coal area is also known as the Illinois Coal Basin. The basin is a shallow, sedimentary and structural basin wherein the rocks (including coal seams) dip toward the center of the basin in southeastern Illinois. Several individual coal seams extend over much of the total basin in the configuration of a shallow saucer. Thus, a coal seam in southwestern Indiana dips toward the southwest, toward the center of the basin in Illinois. The same coal seam in western Illinois, in the vicinity of East St. Louis dips to

the southeast towards the center of the basin. Surface mining in the basin occurs along the periphery of the basin in Indiana, Illinois and western Kentucky where the coal seams come to the surface. These seams are covered with 300 to more than 1000 feet of sandstone and shale in the center area of the basin. Thus, in the center area of the basin these coal seams cannot be mined by surface mining methods, but only by underground methods.

5. The area of the Illinois Basin within Indiana in which potential surface minable reserves are located is set forth on Exhibit 2 within the area outlined by the dark black line. The dark black spots within the outlined area are the mined-out areas. In the Indiana portion of the Illinois Basin, coal dips to the southwest at about 20 feet per mile. Thus, the outcrop of the lower most coals are to the east of the outcrop of the higher coals. The potential area for surface mining has been outlined on Exhibit 2 by constructing a line along the outcrop of the lowest strippable coal and a line west of the outcrop of the lowest strippable coal and a line west of the outcrop of the upper most strippable coal. These are facts generally known based upon prior geological surveys. The area shown on Exhibit 2 was constructed assuming that nearly all of the future surface mining will be in coal seams named III, IV, V, VI and VII. There are other coals that have an outcrop area to the east of these and that have been mined on a small scale in past years. These lower coals occur in restricted areas and are not included in the surface mine area on the map. Only small amounts of coal are available for future mining outside of the area outlined with the black line on Exhibit 2. The east line of Exhibit 2 showing the area for potential surface mining in Indiana is the crop line of Coal III and the west line shows the limit of the area where Coal VII is less than 150 feet deep. Because the depth of these seams from the surface are on the order of 100 feet or less, this makes all of the area between the two constructed lines potential surface mining areas on each coal seam where it is 0 to 150 feet deep. Much strip

mining has already been done in this area as is shown by the solid black patterns. These black patterns represent areas on each of the Coal Seams III through VII where surface mining has already occurred plus some shallow underground mine areas that intermixed with stripping. Not all of the potential surface minable areas will or can be mined. Man-made structures such as cities, airports, major highways, dams, etc. will prevent mining. It is also unlikely that water saturated river valleys can ever economically support surface mining.

6. Exhibit 3 sets forth the area of Indiana for potential underground mines within the Illinois Basin. The coal seams that are thick enough for mining underground are Coals III, IV, V, VI and VII. Because these coal seams dip to the southwest at about 20 feet per mile, each seam becomes too deep for surface mining within a few miles of the outcrop and west of the past and present surface mining areas. Thus, the potential area for underground mining is west of that area shown as available for surface mining on Exhibit 2. The maximum area available for underground mining overlaps slightly with that available for surface mining. That is, where Coal V crops at the surface, Coal III is about 150 feet deep, which is too deep for surface mining. The area for underground mining colored in blue on Exhibit 3 was constructed by drawing an east line where Coal III is 150 feet deep, which is in the same position as where Coal V crops at the surface. In the area shown on Exhibit 3 as the potential underground mining area, not all of the seams are available for mining in any one place and in some areas possible none of the seams would be economically minable. However, in most of this area there is potential at some time in the future for underground mining in at least one seam.

[Dated: March 6, 1979] /s/ CHARLES E. WIER

EXHIBIT 6

AFFIDAVIT OF ROBERT L. MAJOR

Robert L. Major, being first duly sworn, states:

1. I am employed by AMAX Coal Company, a Division of AMAX Inc., in the position of Manager-Business Research in the Planning Department.

2. I received an A.B. degree in geology from Princeton University in 1960 and a Master of Science degree from The Pennsylvania State University in mineral economics in 1965, and I have done further graduate work at Emory University (1960-61) and the University of Illinois (1967-72) where I completed all necessary course work for a Ph.D. degree in geography with a minor in economics.

3. From April, 1965 until June, 1974, I was employed as a minerals economist at the Illinois State Geological Survey.

4. From July, 1974 until April, 1976, I was employed as a resources economist by Battelle Columbus Laboratories in Columbus, Ohio with a specialty in energy and coal economics.

5. Thereafter, until December 1976 when I joined AMAX Coal Co., I was employed in the Energy and Environmental Systems Division of Argonne National Laboratory.

6. The extent of coal produced in Indiana and sold within Indiana is set forth in Table I attached hereto which indicates the trends in shipments of Indiana coal to Indiana destinations for a period of 1972-1977 by type of end-use consumers. From this it is clear that the dominant markets for Indiana coal are located within the State and that electric utilities account for the bulk of the sales. The data is based on total coal shipped regardless of the method of mining. As a practical matter, since 99% of the current coal production in Indiana comes from surface mines, almost the entirety of

the coal can be considered as having been mined by the surface mining method.

7. In my position as Manager Business Research, I am in charge of the maintenance of a computer data base which contains the records of coal purchases by electrical utilities in 1977 (the last full year for which data is available at this time). This information is derived from monthly reports filed by individual electric utilities with the Federal Energy Regulatory Commission (FERC). Table II indicates the record of 1977 coal purchases by all Indiana utility plants with a capacity of 25 megawatts or greater.

8. In 1977, the total production of coal in the State of Illinois was 53,880,434 tons, of which 24,291,457 tons were produced by surface mining and the remaining 29,588,977 tons were produced by underground mining. (Source: *Illinois Coal Facts*, published by the Illinois Coal Association, 1979.)

9. The source of the data on Table I and Table II are indicated on the Tables and are sources generally used by the business community and the federal government for research and planning in making business and policy decisions.

[Dated: March 7, 1979] /s/ ROBERT L. MAJOR

Table I

Trends in Indiana Coal Shipments to Indiana Destinations, 1972-1977

(000 Tons)

	1972	1973	1974	1975	1976	1977
Electric Utilities	15,344	15,596	15,741	17,222	17,448	17,775
Coke & Gas Plants	-	-	-	-	-	4
Retail Dealers	278	109	153	416	222	42
Industrial	4,804	4,129	3,246	2,735	2,963	3,380
Total	20,426	19,834	19,140	20,373	20,633	21,201

(Percent of Total)

Electric Utilities	75.1	78.6	82.2	84.5	84.6	83.8
Coke & Gas Plants	-	-	-	-	-	0.1
Retail Dealers	1.4	0.5	0.8	2.0	1.1	0.2
Industrial	23.5	20.8	17.0	13.4	14.4	15.9
Indiana Coal Shipments to Indiana Customers as Percentage of Indiana Shipments to all Customers	78.3	79.3	80.0	81.1	80.6	81.5

Source: U.S. Bureau of Mines/Department of Energy, Bituminous Coal and Lignite Distribution reports, 1972-1977.

Table II

Indiana Coal Shipments to Indiana Utilities, 1977

Utility	Plant	000 Tons
Crawfordsville	Crawfordsville	47
Frankfort	Frankfort	24
Hoosier Energy	Ratts	574
IMEC	Breed	952
IKEC	Clifty Creek	1,393
IPALCO	Stout	1,725
IPALCO	Pritchard	599
IPALCO	Petersburg	2,391
(IPALCO TOTAL)		(5,075)
NIPSCO	Bailly	763
NIPSCO	Mitchell	82
NIPSCO	Michigan City	23
(NIPSCO TOTAL)		(867)
Peru	Peru	45
PSI	Edwardsport	258
PSI	Gibson	941
PSI	Noblesville	104
PSI	Gallagher	984
PSI	Wabash River	1,717
PSI	Cayuga	2,493
(PSI TOTAL)		(6,496)
Richmond P&L	Whitewater	183
SIGECO	Culley	1,351
SIGECO	Warrick	2,199
(SIGECO TOTAL)		(3,550)
INDIANA, TOTAL		19,283

Source: AMAX Data Base - Based on FERC Form 423 data.

EXHIBIT 11

AFFIDAVIT OF GILBERT S. GRAVES

Alcoa is and has been since July 1978 a member of the Indiana Coal Association.

I am employed as Administrative Manager at Alcoa's Warrick Operations which is an aluminum plant located in Warrick County, Indiana. The Warrick Operations consist of: ownership of three and one-half power generating units producing 582 megawatts; a six pot line aluminum smelter; and aluminum ingot plant; and an aluminum fabricating plant. As of January 1, 1979, Alcoa employed over 3,500 people at the Warrick Operations.

I was familiar with the process by which the present site of Warrick Operations was selected in 1957 for a new aluminum plant. While there are diverse factors that must be considered in making an aluminum plant site selection including, but not limited to, access to water, raw materials and a stable labor work force, the principal reason why Warrick County, Indiana was chosen was its close proximinty to a reliable and inexpensive source of energy—coal.

Since Warrick Operations was designed to consume over two million tons of coal annually, Alcoa needed to find a plant site with large quantities of suitable coal reserves. Accordingly, Alcoa acquired in 1957 about a 45 year supply of coal before final arrangements were concluded on the Warrick Operations plant and construction began. Conversely, if Warrick County and the surrounding environs did not contain significant quantities of coal reserves, Warrick County would not have been picked as the site for Alcoa's new aluminum plant.

[Dated: March 5, 1979] /s/ GILBERT S. GRAVES

EXHIBIT 12

AFFIDAVIT OF WILLIAM M. KESTER, JR.

William M. Kester, Jr., being first duly sworn states:

1. I am manager of Underground Mine Planning for AMAX Coal Company, a Division of AMAX Inc.

2. I have been in underground planning from 1966 to the present and I began working in the coal industry in 1953.

3. I received a Bachelor of Science Degree in mining engineering from West Virginia University in 1962 and a Master of Science in mining engineering from West Virginia University in 1966, and I have received further graduate school training in geophysics and geology.

4. From 1963 to 1968 I worked with Consolidation Coal Company in mining engineering and planning as well as projection. In 1968 I began working with Humble Oil Company [Exxon] and my last position was that of head of underground mining engineering when I left to come with AMAX.

5. If the 1977 Surface Act increases the cost of surface mining coal to the extent that mining by the underground method is made more competitive, and there becomes a reason to shift to underground mining of coal, it is unlikely such a shift would take place to underground coal mining in Indiana. Rather such a shift would be to underground coal mining in Illinois or in western Kentucky. This opinion is based upon by background, training and experience in the underground coal mining industry in Illinois and Indiana, and upon the following.

6. The coal beds in Indiana are of Pennsylvanian age and are a part of what is called the Eastern Interior Coal Province which encompasses most of Illinois, the southwestern extremity of Indiana and western Kentucky. The deposition was thought to have occurred by sediments being deposited from structural highs in the west and the east.

7. The portion of the province lying in Indiana is actually the very most eastern fringe of the basin. The western fringe of the basin occurs east of St. Louis in Illinois, generally slightly east of the Illinois River drainage area. The center of the basin occurs on a structural low, running roughly north-south near McCleansboro, Illinois and through the most southwestern point of Indiana.

8. Underground production prior to 1950 was fairly prominent in Indiana. Since that time underground production has continually decreased until at the present time it is almost inconsequential.

9. Several deep operations continued into the 1960's and 1970's, as the King Station Mine operated by Old Ben Coal Corporation and the Thunderbird Mine in Sullivan County operated by AMAX Coal Company. One deep mine—V-Day Coal Company has also operated intermittently. Each of the above deep mines are now idle, demonstrating one of the problems faced for deep mines in Indiana. Each of the mines was closed primarily due to economic and geological problems. Kings Station ceased operation partly due to adverse roof conditions. The Thunderbird Mine encountered difficult roof conditions, sulfurballs as well as erratic coal thickness. Conditions were less than desirable in both No. 6 and No. 5 seams. The reserves in the Thunderbird Mine were never exhausted and economic consideration, due to the above, dictated closure. The V-Day Coal Mine operated intermittently from 1960 through approximately 1972 but was closed in part due to geological conditions and increased cost.

10. At the present time there are only four underground coal mines open in Indiana. Three of them have inconsequential production, and the fourth, Squaw Creek's Spur Mine which accounted for 60% of the total underground production in Indiana in 1978, is a developmental mine whereby attempts are being made to solve roof condition related problems.

11. Conclusions as to the reasons for the absence of underground mining activities in Indiana in spite of the substantial estimated "underground mineable" reserves are:

a. The depositional environment is more stable in the central part of the Eastern Interior Basin. The odds are more favorable for finding extensive reserves of thick, cleaner seams in the Illinois and western Kentucky portion of the basin.

b. Many of the seams in Indiana are thinner and multi-bedded with numerous shale partings in several seams. The seams in Illinois and in western Kentucky have greater thickness and better conditions which are more conducive to favorable deep mining ventures.

c. One of the basic problems in establishing viable deep mining ventures in Indiana is the lack of available large extensive, thick, deep mineable coals having the desirable roof and floor conditions required to commit the large capital expenditures required for deep mining operations. As an example, I was previously employed by a large energy company prior to joining the AMAX organization. This company was interested in a resource base capable of supporting gasification and liquefaction projects which would utilize Indiana coal resources in a manner compatible with environmental concerns. Several such areas are located in Illinois, but not one reserve area was located in Indiana which could satisfactorily meet project criteria through the period of 1968 to 1974.

d. Past experiences in deep mining ventures in Indiana led to a stigma that deep mining conditions in general are less desirable than those encountered in Illinois. Several geologic anomalies contribute to such reputation or conclusion as:

(1) the fault systems which are known to exist parallel to the Wabash River—the New Harmony Fault is an example;

(2) the highly undulatory nature of the No. 5 seam which has been encountered in several active and potential deep mining areas;

(3) the occurrences of contemporaneous or post depositional channels disrupting the Seelyville coal and the interplay of such channel deposits upon predicting adverse roof conditions mentioned above.

12. The utilities which purchase coal under long term contracts, generally require blocks of coal containing up to 50 million tons. These are not available in the Indiana underground reserves.

13. In general, the assimilation of the geological data relative to deep mineable coals in Indiana and in light of past and present experience, suggest that as economical surface mines are depleted or phased out for whatever reason, the emphasis will be upon the development of the Illinois deep mine coals prior to development of Indiana underground coals.

14. It takes up to eight to nine years to develop a deep mine including exploration drilling, evaluation, mine design, approval of permits, mining construction and production build-up. In the event of reduction of surface mine production in Indiana extensive time would be required before recoupment would be possible from underground operations.

[Dated: March 2, 1979] /s/ WILLIAM M. KESTER, JR.

EXHIBIT 13

AFFIDAVIT OF RALPH E. CLARK

RALPH E. CLARK, being first duly sworn upon his oath states as follows:

1. I am employed by the State of Indiana as Director of the Bureau of Mines and Mining of the Indiana Division of Labor.

2. As a part of the official duties of the Bureau, records are kept concerning production of coal within the State of Indiana and based on these records, the following is the tonage reported by coal companies as having been produced within the State of Indiana and within various specific counties. The total figure for the State of Indiana is estimated due to the failure of several companies to report tonage or due to instances where the companies refuse to report tonage.

	TONS 1977	TONS 1978
STATEWIDE ANNUAL PRODUCTION		
Underground Method	524,852	587,853
Surface Method	27,470,394	23,354,380
COUNTIES - SURFACE MINING		
Clay:		
AMAX	1,124,129	1,300,823
Peabody	-0-	-0-
TOTAL	1,398,183	1,527,249

Green:		
Peabody	913,725	1,428,693
TOTAL	1,009,749	1,554,142
Pike:		
AMAX	613,766	76,286
Old Ben	4,812,698	3,915,301
TOTAL	6,777,434	5,427,953
Sullivan:		
AMAX	1,773,183	1,317,932
Peabody	654,284	577,254
TOTAL	3,357,502	1,962,618
Vermillion:		
Peabody	2,376,732	1,947,341
TOTAL	2,419,737	1,989,677
Warrick:		
AMAX	3,365,044	2,469,624
Peabody	1,115,500	2,552,602
Squaw Creek [ALCOA and Peabody]	3,343,728	1,317,025
TOTAL	8,979,398	6,851,427

4. Further Affiant sayeth not.

[Dated: March 5, 1979] /s/ RALPH E. CLARK

EXHIBIT 14

PLAINTIFFS' REQUEST FOR ADMISSIONS

Come now plaintiffs in the above entitled consolidated actions and request that the defendants admit the following facts for the purpose of this action and that a response be filed to this request within thirty (30) days as required by the Federal Rules of Civil Procedure or in such shorter time as the Court might order:

1. That the attached Exhibit 1 consisting of eleven pages are genuine, true and correct copies of an official publication of the United States Department of Agriculture.

2. That the attached exhibit contains statistics which are reliable and generally used by persons working in agricultural related business.

STATE OF INDIANA

/s/ DONALD P. BOGARD
Chief Counsel, Office of
the Attorney General

ICE MILLER DONADIO & RYAN

/s/ G. DANIEL KELLEY, JR.
Attorney for Plaintiffs

[Filed: March 9, 1979]

No. A 78-1

Indiana Crop and Livestock Statistics

June 1978

Annual Crop and Livestock Summary 1977

UNITED STATES DEPARTMENT OF AGRICULTURE
STATISTICS; Economics, Statistics, and Cooperatives Service

cooperating with
PURDUE UNIVERSITY
Agricultural Experiment Station • Department of Agricultural Statistics, West Lafayette, IN, 47

INDIANA
ANNUAL CROP AND LIVESTOCK SUMMARY
1977
Issued Cooperatively By

U. S. DEPARTMENT OF AGRICULTURE

BOB BERGLAND, *Secretary of Agriculture*
WILLIAM E. KIBLER, *Deputy Administrator, STATISTICS; Economics, Statistics, and Cooperatives Service*

PURDUE UNIVERSITY

RICHARD L. KOHLS, *Dean of Agriculture*
B. J. LISKA, *Director of Agricultural Experiment Station*

Compiled and Prepared by
INDIANA CROP AND LIVESTOCK REPORTING SERVICE
Agricultural Administration Building
Purdue University
West Lafayette, Indiana 47907
Telephone: (317)-749-2429

EARL L. PARK, *Agricultural Statistician in Charge*

For statistical purposes, the counties of Indiana are grouped into nine Crop Reporting Districts (shown on the map at right). These groupings represent divisions of approximately equal size with similar soils, growing conditions and types of farming.

Crop Reporting Districts are used in the compilation of most reports. It is not possible to collect sufficient data for each county to make county estimates on a timely basis. It is possible to summarize data at a district level and weight districts together by production percentages to arrive at the best State estimates.

Many data series in this bulletin present estimates for Crop Reporting Districts. Some series are further broken down into county estimates within districts.

Indiana Crop Reporting Districts

FOREWORD

This summary is the result of the continuing cooperation between the farmer and agribusinessmen of the State of Indiana, the Agricultural Experiment Station, Purdue University, and the Economics, Statistics, and Cooperatives Service of the U.S. Department of Agriculture. It provides the official estimates of agricultural production for 1977 together with comparison back through 1975. Included are State estimates of acreage, yield, production, disposition, and other information related to crops; production and inventory numbers of livestock, including dairy and poultry; price and farm income data; labor and wage rates; and weather and crop progress data. County estimates for major crop and livestock items are also included. Historic State data from 1866 through 1974 and county crop estimates from 1923 through 1974 are also available upon request.

Farming is such an integral part of the national and world economy that it can not function effectively without reliable information on which planning and marketing decisions can be based. To meet the needs of the farmers and others involved in agriculture, statistics are made available throughout the year in the form of weekly, monthly, and quarterly reports. The reports and approximate dates of release are shown on the inside back cover of this publication.

I wish to acknowledge the valuable assistance of the many Indiana farmers and agribusinessmen who voluntarily provide the raw data from which the official estimates are set. A special thanks is extended to our field enumerators and telephone enumerators who are a vital link in our data gathering process, and to all members of the office who had a part in carrying out the surveys, evaluating the results and establishing the estimates which are presented in this publication.

Earl L. Park
Statistician, In Charge

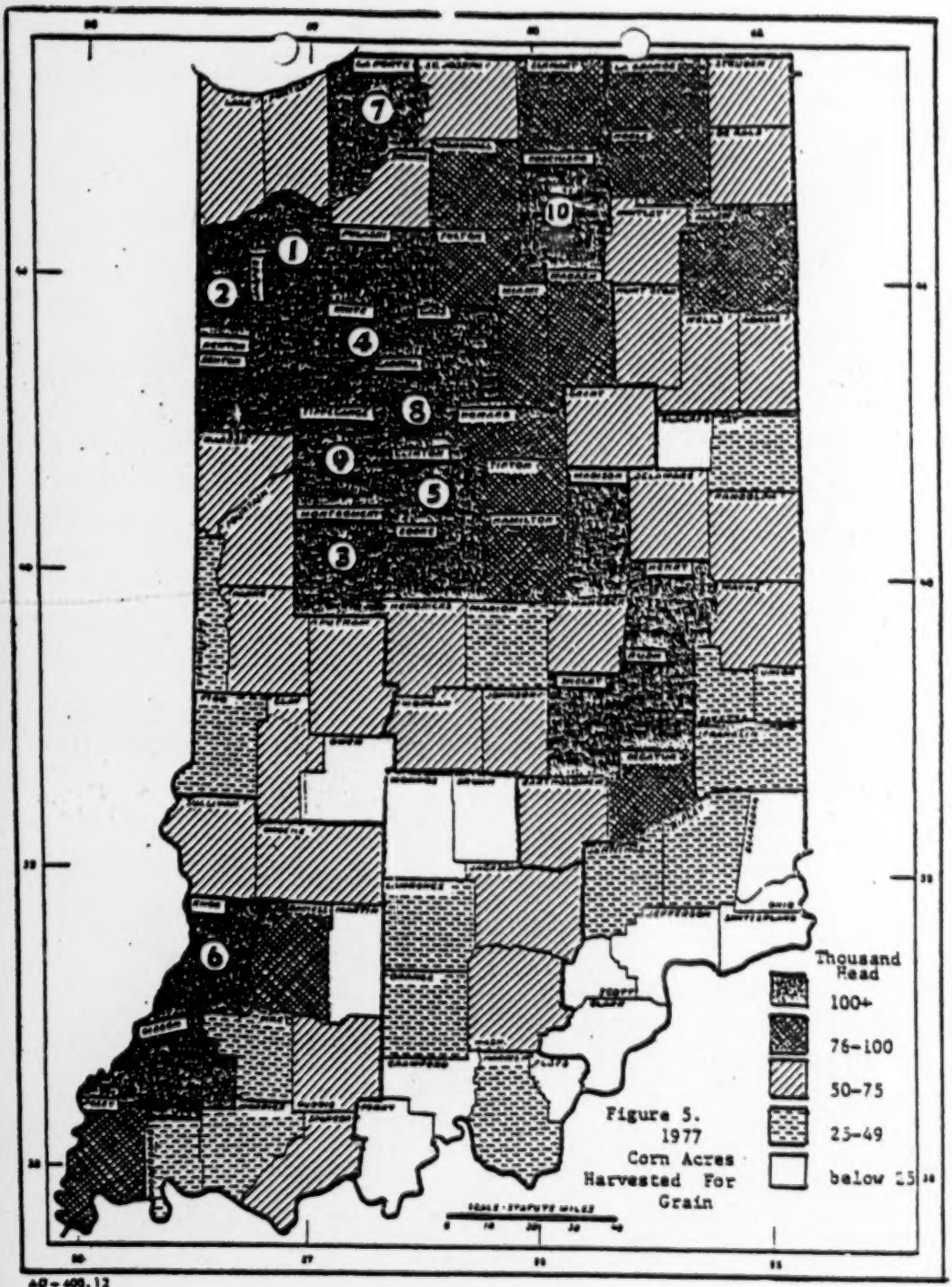


Figure 5.
1977
Corn Acres
Harvested For
Grain

AD-409-12
4-58

CORN FOR GRAIN: ACREAGE, YIELD AN PRODUCTION BY COUNTIES, INDIANA, 1975 AND 1976 REVISED, AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1975	1976	1977	1975	1976	1977	1975	1976	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
1.	BENTON	118.5	121.3	118.4	118	115	105	13,989.9	13,996.1	12,343.2
	JASPER	153.2	161.8	176.7	106	107	95	16,223.7	17,419.0	16,865.8
	LAKE	68.7	75.1	69.8	100	113	106	6,883.4	8,513.4	7,298.6
	LA PORTE	121.4	132.0	128.8	96	107	101	11,681.4	14,162.0	12,967.8
	NEWTON	131.1	147.8	144.7	116	124	113	15,193.0	18,151.8	16,760.1
	PORTER	66.9	76.3	70.7	95	111	103	6,539.2	8,484.9	7,250.8
	PULASKI	114.1	124.5	118.8	96	113	112	10,943.1	14,113.4	13,148.1
	STARKE	68.5	73.5	69.7	98	109	108	6,159.1	8,034.4	7,502.1
	WHITE	135.8	144.8	144.7	105	111	110	14,181.4	16,032.4	15,929.8
	TOTAL	979.8	1074.7	1048.7	103.8	112.5	105.3	101,734.1	120,917.4	109,666.3
2.	CARROLL	124.6	122.5	124.6	138	119	106	14,234.3	14,630.6	13,158.2
	CASS	97.8	110.1	102.2	114	104	97	11,138.9	11,474.0	9,858.7
	ELKHART	75.3	80.1	78.2	89	105	105	6,695.3	8,431.6	8,178.8
	FULTON	77.9	86.8	80.6	96	115	94	8,093.8	9,923.1	7,611.4
	KOSCIUSKO	113.8	119.9	121.9	98	95	104	10,166.3	11,407.5	12,625.5
	MARSHALL	99.1	98.1	86.3	86	107	99	7,311.8	9,944.6	8,500.1
	MIAMI	98.3	88.5	85.5	106	109	93	8,503.7	9,674.1	7,987.2
	ST. JOSEPH	69.7	75.8	73.3	84	109	100	5,849.2	8,289.6	7,294.1
	WABASH	83.6	93.7	86.1	98	105	96	8,185.6	9,843.2	8,393.0
	TOTAL	792.3	866.7	838.7	99.6	107.7	99.7	78,778.9	93,368.5	83,607.0
3.	ADAMS	58.7	64.8	59.4	78	97	96	3,965.2	6,214.6	5,790.3
	ALLEN	87.6	94.8	89.8	88	91	96	6,953.1	8,562.8	8,675.7
	DE KALB	66.9	69.8	58.1	84	95	93	3,768.8	6,738.1	4,648.2
	HUNTINGTON	59.4	68.5	60.8	88	105	107	5,222.2	7,210.5	6,397.1
	LAGRANGE	78.6	74.4	88.7	94	105	112	6,830.8	7,831.6	9,913.6
	NOBLE	65.3	69.7	78.7	98	103	111	5,871.4	7,196.8	8,719.5
	STEUBEN	62.5	66.4	58.1	74	93	99	3,142.1	6,325.6	6,934.6
	WELLS	63.4	69.8	63.1	86	107	106	5,447.2	7,059.5	6,791.7
	WHITLEY	94.5	82.3	88.7	82	103	102	6,628.4	8,431.8	9,163.6
	TOTAL	566.3	594.9	591.8	83.5	100.1	103.3	45,628.8	59,569.3	61,157.5
4.	CLAY	57.9	66.3	65.6	98	101	101	5,668.4	6,710.5	6,584.5
	FOUNTAIN	64.5	75.5	73.7	116	124	111	7,483.7	9,339.9	8,157.1
	MONTGOMERY	117.4	137.6	142.9	112	114	108	13,138.9	15,748.5	15,380.9
	OWEN	16.4	19.8	19.6	98	105	112	1,674.4	2,089.8	2,189.2
	PARKE	55.1	64.1	65.5	110	114	106	6,059.2	7,344.2	6,784.8
	PUTNAM	66.5	73.8	72.8	101	117	110	6,711.9	8,678.9	7,987.6
	TIPPECANOE	107.2	123.9	123.6	112	108	87	11,994.9	13,414.3	10,753.5
	VERMILLION	32.0	36.3	37.2	112	124	108	3,580.8	4,482.4	4,038.8
	VIGO	62.6	66.5	66.9	104	95	91	6,426.2	6,324.1	6,248.1
	WARREN	41.1	64.3	68.2	126	119	98	7,691.2	8,157.3	6,648.1
	TOTAL	622.7	718.9	716.8	110.1	112.4	101.7	68,543.1	80,281.1	72,821.8
5.	BARTHOLOMEW	58.5	66.7	71.3	88	111	103	6,515.7	7,644.8	7,312.3
	BOONE	88.8	99.8	102.5	116	114	111	10,036.0	11,614.4	11,344.7
	CLINTON	118.8	137.7	132.0	124	115	103	14,717.1	15,844.5	13,537.5
	DECATUR	66.5	92.5	89.5	87	123	116	7,344.5	11,324.5	10,562.0
	GRANT	66.8	78.4	71.2	118	107	104	7,341.0	8,219.7	7,374.3
	HAMILTON	73.5	82.7	86.1	108	113	97	7,938.6	9,374.9	8,112.7
	HANCOCK	63.7	71.7	71.5	94	115	95	5,982.1	8,273.1	6,824.6
	HENDRICKS	68.8	72.7	73.2	102	128	109	5,916.1	8,748.4	7,953.1
	HOWARD	78.3	83.6	75.7	122	111	91	9,299.7	9,245.4	6,918.0
	JOHNSON	53.2	58.9	60.5	99	117	84	5,261.9	6,915.4	5,098.9
	MADISON	98.7	111.1	118.7	105	107	84	10,143.4	11,919.4	10,084.0
	MARION	24.7	29.2	30.5	84	108	105	2,072.4	3,162.3	3,189.9
	MORGAN	45.8	54.1	53.9	94	118	102	4,225.9	6,484.6	5,473.1
	RUSH	93.7	97.9	101.6	98	125	121	8,624.9	12,188.8	12,274.8
	SHELBY	108.4	112.2	110.9	88	115	100	8,828.7	12,944.2	11,035.7
	TIPTON	64.4	76.5	77.1	120	124	104	7,728.4	9,444.4	8,298.8
	TOTAL	1162.8	1325.9	1329.2	103.8	115.5	102.2	119,753.4	153,194.2	135,298.2
6.	BLACKFORD	22.8	24.1	24.1	97	115	110	2,259.6	3,011.5	2,442.9
	DELAWARE	67.7	74.5	72.8	104	103	95	7,034.1	7,691.3	6,944.7
	FAYETTE	36.3	38.2	40.8	80	105	96	2,901.2	4,021.1	3,899.2
	HENRY	88.7	93.9	100.1	85	110	93	6,852.9	10,349.4	9,351.2
	JAY	37.7	41.6	42.6	83	97	83	3,128.1	4,061.5	3,547.1
	RANDOLPH	68.2	74.6	71.3	84	94	85	5,859.6	7,033.1	6,081.9
	UNION	32.5	35.6	34.1	108	118	108	3,546.9	4,215.8	3,670.3
	WAYNE	68.4	67.6	69.3	88	103	100	6,027.6	6,979.0	6,896.1
	TOTAL	488.3	492.3	484.3	88.7	104.7	94.7	38,657.7	47,381.7	43,037.8

Table 10. CORN FOR GRAIN: ACREAGE, YIELD AND PRODUCTION BY COUNTIES, INDIANA, 1975 AND 1976 REVISED, AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1975	1976	1977	1975	1976	1977	1975	1976	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
7.	DAVIESS	76.3	87.9	84.5	106	130	112	8,080.1	11,387.9	9,485.1
	DUBOIS	57.5	61.4	62.8	96	105	94	5,514.7	6,443.2	6,843.7
	GIBSON	100.8	122.4	118.8	116	117	104	11,644.8	14,278.9	11,418.4
	GREENE	92.5	92.7	88.8	101	96	102	9,297.4	8,829.8	8,892.5
	KNOX	116.0	128.5	129.4	110	128	112	12,747.8	16,347.7	14,453.4
	MARTIN	19.4	21.5	21.4	74	71	93	1,436.2	1,523.3	1,999.1
	PIKE	35.8	41.9	39.7	98	103	91	3,218.9	4,329.7	3,628.1
	PUSEY	83.2	102.1	96.7	100	115	106	9,312.8	11,748.8	9,578.2
	SPENCER	46.4	50.7	56.9	76	83	89	3,523.8	4,207.9	4,341.5
	SULLIVAN	97.3	78.4	66.9	106	111	112	6,068.8	7,834.1	7,449.8
	VANDERBURGH	31.9	30.4	31.8	102	107	114	3,256.7	3,985.3	3,618.5
	WARRICK	37.3	44.5	43.1	92	107	114	3,428.3	4,774.3	4,914.1
	TOTAL	719.8	838.4	796.4	100.8	112.8	105.2	72,523.9	92,893.9	83,764.4
8.	BROWN	2.8	3.4	3.6	78	100	104	218.2	343.4	376.5
	CRAWFORD	6.0	6.7	6.9	68	99	46	359.7	644.4	479.4
	FLOYD	7.1	3.3	3.4	64	101	95	284.4	334.3	324.5
	HARRISON	24.4	28.3	27.9	58	91	102	1,413.8	2,577.9	2,833.8
	JACKSON	63.8	66.7	67.1	71	109	102	4,525.4	7,269.7	6,813.4
	LAWRENCE	27.1	28.5	30.1	73	105	93	1,976.4	3,000.8	2,811.9
	MONROE	9.4	10.8	10.2	84	93	108	788.4	987.8	1,015.8
	ORANGE	25.7	28.4	29.8	70	107	84	1,797.2	3,047.8	2,573.9
	PERRY	12.3	15.2	15.4	80	95	101	983.1	1,292.3	1,544.1
	WASHINGTON	49.8	51.9	54.3	61	105	89	3,034.9	5,441.2	4,852.1
	TOTAL	224.4	245.2	247.7	68.2	103.1	96.2	15,382.1	25,249.2	23,827.6
9.	CLARK	18.3	20.4	21.2	81	92	97	1,480.9	1,879.8	2,045.1
	FLOYD	15.1	19.0	17.8	62	89	94	935.3	1,682.3	1,648.9
	FRANKLIN	48.4	49.3	48.5	86	99	104	3,471.1	4,883.3	5,028.3
	JEFFERSON	18.9	17.8	18.5	72	97	99	1,215.4	1,729.4	1,822.2
	JENNINGS	28.1	31.7	29.4	84	113	89	2,358.1	3,583.5	2,627.1
	OHIO	4.8	5.7	5.6	88	104	104	287.7	594.7	580.8
	RIPLEY	32.1	30.2	34.8	72	107	104	2,309.8	3,883.8	3,681.7
	SCOTT	13.1	14.9	15.3	72	103	115	942.3	1,538.3	1,755.6
	SWITZERLAND	7.8	8.8	7.9	81	91	98	628.6	724.7	778.1
	TOTAL	175.8	199.8	208.2	76.4	101.2	101.4	13,428.4	20,132.7	20,383.8
STATE		5638.8	6388.8	6210.8	98.8	118.8	102.8	551,748.8	692,084.8	633,428.8

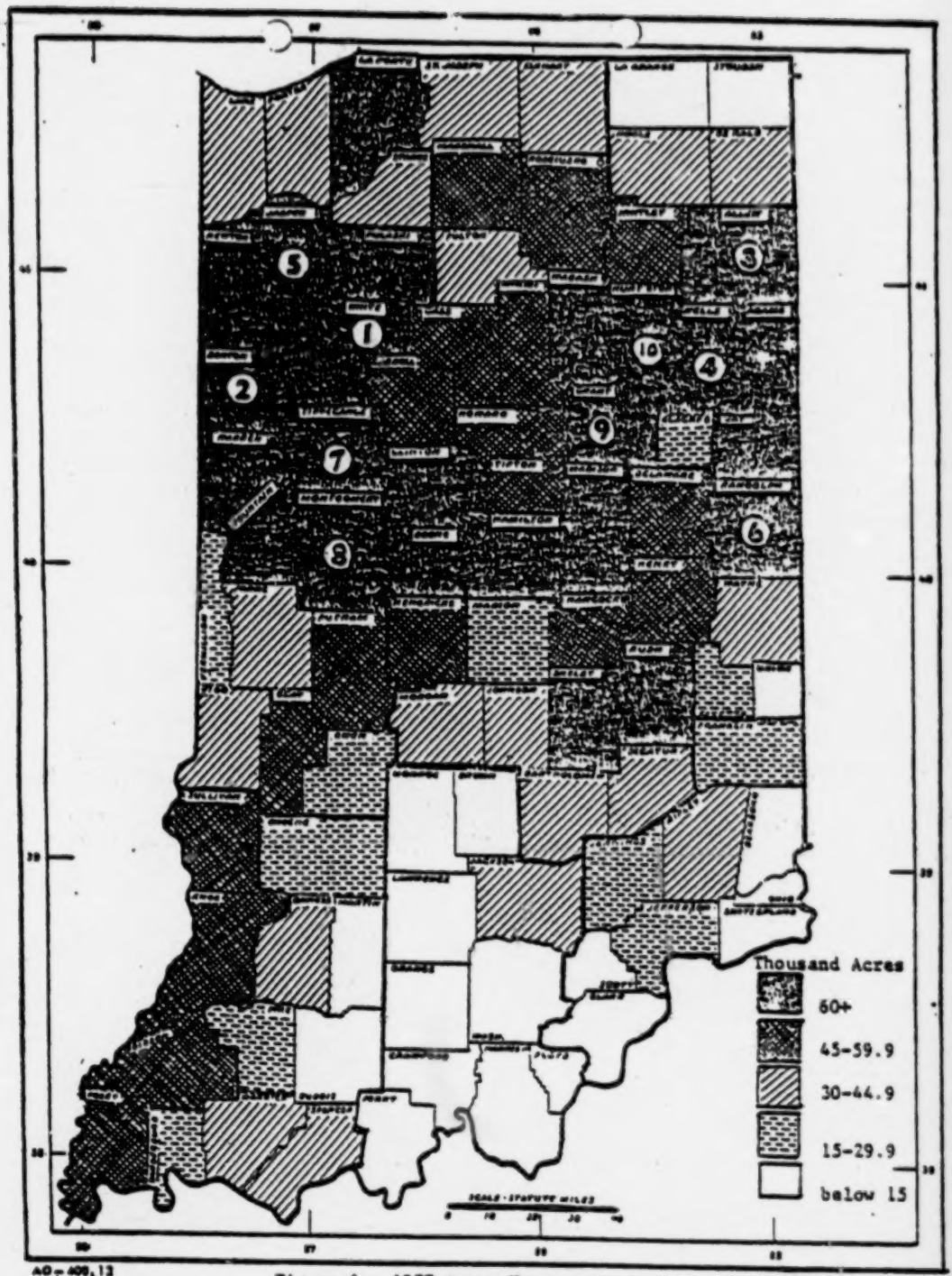


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Figure 6. 1977 Acres Harvested, Soybeans for Beans

TABLE 11. SOYBEANS: ACREAGE, YIELD AND PRODUCTION BY COUNTIES, INDIANA, 1975 AND 1976 REVISED AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1975	1976	1977	1975	1976	1977	1975	1976	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
1.	BENTON	87.9	83.7	94.5	39	36	41	3,352.2	3,043.2	3,984.9
	JASPER	77.2	72.6	82.7	35	32	35	2,676.4	2,337.9	2,929.1
	LAKE	35.5	34.3	39.1	32	38	37	1,125.2	1,033.3	1,441.8
	LA PORTE	55.5	53.7	65.2	32	33	34	1,786.7	1,757.2	2,181.8
	NEWTON	56.4	56.9	63.6	35	32	36	1,955.3	1,832.3	2,315.2
	PORTER	37.1	37.1	44.7	34	33	33	1,249.5	1,233.3	1,451.3
	PULASKI	59.2	64.1	71.7	33	32	39	2,262.8	2,084.2	2,821.7
	STARKE	31.6	29.8	36.3	24	29	24	751.2	572.4	877.4
	WHITE	94.7	88.8	100.2	38	36	39	3,564.5	3,182.5	3,943.2
	TOTAL	545.1	520.2	596.0	34.3	32.6	36.7	18,723.0	17,056.3	21,885.6
2.	CARROLL	53.6	48.8	57.3	41	37	38	2,176.8	1,795.8	2,198.6
	CASS	58.7	48.9	55.2	39	35	39	1,983.7	1,597.3	2,172.3
	ELKHART	34.6	30.7	36.9	33	32	34	1,131.8	972.7	1,273.6
	FULTON	41.8	37.6	44.1	33	30	34	1,366.3	1,113.2	1,518.6
	KOSCIUSKO	52.1	47.5	57.2	32	30	34	1,677.3	1,486.3	1,969.7
	MARSHALL	42.7	37.9	45.9	29	29	34	1,228.6	1,132.4	1,535.4
	MIAMI	45.3	41.6	47.5	46	32	35	1,817.3	1,299.8	1,682.4
	ST. JOSEPH	35.2	31.7	38.8	33	33	34	1,156.6	1,037.3	1,297.9
	WABASH	53.6	50.6	48.2	36	34	48	1,945.1	1,708.3	2,428.3
	TOTAL	409.8	378.9	443.1	35.3	32.4	36.3	14,474.7	12,031.5	16,073.8
3.	ADAMS	46.8	39.7	78.5	26	34	34	1,732.4	2,046.5	2,427.6
	ALLEN	85.9	80.4	93.2	32	32	38	2,755.4	2,547.3	3,576.1
	DE KALB	41.6	37.7	43.8	27	27	30	1,133.2	984.7	1,269.2
	HUNTINGTON	68.6	63.9	76.2	34	32	37	2,344.3	2,057.7	2,848.8
	LAGRANGE	13.7	11.4	13.7	30	31	36	413.9	355.3	498.7
	NOBLE	29.7	25.9	31.1	29	32	35	867.9	820.6	1,101.5
	STEUBEN	13.8	10.7	12.6	24	28	35	334.8	296.6	444.3
	WELLS	78.9	73.0	87.1	34	34	38	2,657.2	2,582.4	3,342.0
	WHITLEY	42.5	38.9	46.9	30	29	34	1,262.9	1,111.3	1,535.4
	TOTAL	439.9	401.6	473.3	30.7	31.7	36.6	13,512.8	12,734.4	17,043.6
4.	CLAY	45.4	41.8	47.1	36	39	33	1,618.9	1,597.1	1,529.2
	FOUNTAIN	58.5	53.7	65.2	34	36	29	1,999.2	1,952.4	1,868.3
	MONTGOMERY	75.8	67.5	79.8	36	38	37	2,674.4	2,594.4	2,953.5
	OWEN	14.5	13.2	15.7	32	31	33	453.6	404.5	509.7
	PARKE	46.7	34.3	41.7	34	36	38	1,370.7	1,229.3	1,600.8
	PUTNAM	43.3	38.9	46.3	29	35	35	1,243.8	1,373.9	1,639.9
	TIPPECANOE	71.3	65.4	80.1	38	34	37	2,719.1	2,241.9	2,994.6
	VERMILLION	29.1	21.1	25.2	31	41	37	783.2	854.8	942.1
	VIGO	36.1	33.1	39.1	33	29	33	1,188.3	942.8	1,289.5
	WARREN	68.9	55.7	67.7	38	36	38	2,622.5	2,025.1	2,597.6
	TOTAL	470.8	423.9	507.1	34.8	35.9	35.3	16,371.4	15,236.2	17,896.4
5.	BARTHOLOMEW	36.2	31.9	37.3	26	30	34	950.2	941.3	1,284.4
	BOONE	64.2	58.5	70.3	38	35	40	2,416.5	2,035.8	2,835.7
	CLINTON	71.1	58.6	70.3	39	41	43	2,746.7	2,454.1	3,043.2
	DECATUR	35.7	31.8	38.6	34	45	38	1,202.3	1,420.4	1,481.1
	GRANT	78.9	66.8	78.9	37	34	39	2,598.5	2,289.9	3,105.8
	HAMILTON	58.4	53.7	61.2	38	36	38	2,122.9	1,952.4	2,348.2
	HANCOCK	52.7	47.8	58.0	36	37	37	1,905.4	1,757.6	2,168.4
	HENDRICKS	51.0	45.7	56.4	40	43	42	2,020.7	1,946.4	2,386.8
	HOWARD	52.2	48.6	56.4	43	38	39	2,223.4	1,842.7	2,219.5
	JOHNSON	33.6	29.8	35.2	38	37	34	1,015.1	1,114.4	1,177.5
	MADISON	79.8	61.5	67.6	35	34	36	2,681.5	2,104.2	2,480.6
	MARION	28.2	19.9	24.9	34	32	32	747.7	682.8	755.6
	MORGAN	38.8	27.2	31.4	27	35	31	817.2	946.5	957.7
	RUSH	57.9	53.2	64.1	40	42	43	2,296.1	2,210.5	2,774.8
	SHELBY	56.2	50.4	60.6	34	38	37	1,892.7	1,926.6	2,265.6
	TIPTON	49.3	45.5	52.3	39	36	43	1,929.6	1,654.3	2,269.8
	TOTAL	889.6	731.2	862.6	36.2	37.2	38.9	29,343.9	27,223.8	33,527.5
6.	BLACKFORD	29.8	25.1	29.5	30	31	35	874.1	782.2	1,044.8
	DELAWARE	54.8	52.8	54.9	35	31	37	2,033.8	1,639.2	2,237.-
	FAYETTE	17.9	15.9	19.8	33	37	36	585.1	594.6	691.-
	HENRY	52.2	48.6	55.8	35	34	35	1,889.7	1,573.2	1,948.8
	JAY	66.4	58.-	69.7	31	25	26	2,038.9	1,456.8	1,782.9
	RANDOLPH	82.3	73.7	86.9	35	31	33	2,853.2	2,296.8	2,760.1
	UNION	14.7	11.8	14.2	36	42	38	524.2	496.-	544.8
	WAYNE	35.8	28.9	33.4	30	33	34	1,057.4	945.7	1,150.1
	TOTAL	356.5	313.3	361.6	33.8	31.3	33.5	11,778.4	9,784.1	12,197.7

Table 11. SOYBEANS: ACREAGE, YIELD AND PRODUCTION BY COUNTIES, INDIANA, 1975 AND 1976 REVISED, AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1975	1976	1977	1975	1976	1977	1975	1976	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
7.	DAVIESS	38.8	28.2	33.9	33	38	34	1.006.8	1.083.9	1.134.0
	DUBOIS	13.0	9.9	11.8	26	31	28	334.A	308.5	325.1
	GIBSON	49.4	43.8	53.6	35	37	37	1.737.1	1.676.8	2.003.9
	GREENE	24.8	22.4	27.7	36	35	34	884.4	779.5	926.6
	KNOX	49.5	42.9	52.1	32	40	34	1.569.0	1.693.4	1.794.3
	MARTIN	4.2	3.2	3.8	27	29	33	112.3	92.5	123.-
	PIKE	28.3	18.4	28.1	26	31	25	522.8	511.1	696.4
	POSEY	47.2	41.7	52.8	38	34	40	1.778.6	1.429.5	2.129.8
	SPENCER	41.9	37.8	42.3	29	32	31	1.203.6	1.201.6	1.290.1
	SULLIVAN	48.4	37.3	46.0	38	39	33-	1.838.5	1.483.1	1.493.5
	VANDERBURGH	26.7	23.1	28.8	30	32	38	793.4	731.9	1.105.8
	WARRICK	28.8	28.4	31.3	28	32	35-	798.8	890.1	1.168.6
	TOTAL	377.8	332.3	404.2	31.7	35.2	34.5	11.940.1	11.711.9	13.926.4
8.	BROWN	1.1	1.0	1.1	33	31	33	36.0	31.2	35.7
	CRAWFORD	2.2	2.0	2.2	27	30	29	58.4	59.2	62.4
	FLOYD	1.9	1.7	1.9	20	26	23	37.6	44.9	43.8
	HARRISON	9.9	8.3	9.6	19	27	30	186.3	211.9	283.3
	JACKSON	33.1	29.2	33.6	22	33	33	721.3	975.4	1.136.6
	LAWRENCE	8.3	7.2	8.9	22	24	27	180.9	170.8	238.4
	MONROE	4.4	4.3	5.2	31	30	32	134.7	129.6	163.7
	ORANGE	7.4	5.1	6.3	25	27	30	186.9	139.2	188.9
	PERRY	6.7	4.9	5.7	25	27	29	169.3	132.3	162.8
	WASHINGTON	13.4	12.1	14.4	21	26	27	278.7	314.2	382.5
	TOTAL	88.4	75.5	89.1	22.5	29.1	30.2	1.990.1	2.198.7	2.686.5
9.	CLARK	14.8	11.9	14.5	33	34	32	483.8	407.9	456.5
	DEARBORN	6.3	5.6	6.6	21	36	31	134.2	203.6	201.3
	FRANKLIN	16.9	13.8	16.3	34	34	39	577.6	470.2	641.5
	JEFFERSON	18.3	14.7	17.2	22	30	28	407.9	442.8	473.8
	JENNINGS	25.3	22.8	26.9	22	31	28	563.9	689.6	741.6
	OHIO	1.4	0.9	1.1	21	30	29	29.8	27.1	31.4
	RIPLEY	33.4	29.4	35.1	27	32	33	909.8	946.8	1.139.6
	SCOTT	11.6	9.1	10.8	22	28	33	252.A	255.2	350.6
	SWITZERLAND	4.9	4.0	4.5	23	26	30	111.6	103.9	132.8
	TOTAL	132.9	111.4	133.0	26.1	31.8	31.3	3.471.4	3.543.1	4.168.5
STATE		3638.0	3280.0	3870.0	33.5	34.0	36.0	121.485.0	111.520.0	139.320.0

Table 12. WINTER WHEAT: ACREAGE, YIELD AND PRODUCTION BY COUNTIES, INDIANA, 1978 AND 1978 REVISED, AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1979	1978	1977	1979	1978	1977	1979	1978	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
1.	BENTON	14.7	13.2	11.9	57	63	62	838.0	862.4	738.2
	JASPER	9.7	10.7	8.2	63	62	61	616.5	693.0	534.9
	LAKE	15.5	16.7	12.8	63	68	63	868.7	874.1	517.6
	LA PORTE	25.9	28.9	21.5	66	32	36	1,821.5	867.4	642.0
	NEWTON	7.7	7.8	6.7	52	63	53	403.3	337.9	253.4
	PORTER	17.9	19.8	14.5	39	32	36	698.7	617.5	548.1
	PULASKI	12.8	13.5	11.3	66	36	39	556.5	691.7	438.8
	STARKE	7.0	7.2	5.8	39	33	31	273.2	233.9	179.3
	WHITE	16.5	17.3	13.4	50	37	53	835.5	647.2	706.9
	TOTAL	127.2	135.8	105.3	44.9	36.8	42.3	5,706.1	4,969.5	4,434.8
2.	CARROLL	15.8	19.9	13.8	53	37	49	801.2	632.2	663.3
	CASS	24.8	25.5	18.4	37	35	46	1,355.6	983.7	846.7
	ELKHART	23.5	27.1	21.8	46	36	33	941.4	888.4	718.8
	FULTON	17.7	14.3	14.9	42	35	37	745.4	644.6	548.7
	KOSCIUSKO	28.4	38.7	24.3	45	36	39	1,283.5	1,116.3	943.3
	MARSHALL	16.3	18.8	14.2	48	31	35	952.9	564.3	484.7
	MIAMI	18.4	19.3	14.1	50	37	55	926.1	727.8	881.3
	ST. JOSEPH	23.4	23.5	19.8	37	35	32	865.2	809.7	630.6
	WABASH	23.2	30.1	28.7	44	38	45	1,024.7	1,155.7	1,193.9
	TOTAL	189.9	239.4	170.2	45.3	35.1	40.7	8,596.2	7,339.9	6,934.5
3.	ADAMS	28.6	28.6	29.5	47	41	49	1,256.4	1,142.6	1,064.4
	ALLEN	48.9	41.2	40.2	47	41	51	1,932.4	1,763.5	2,048.6
	DE KALB	25.4	25.9	22.3	39	38	39	981.4	984.4	673.4
	HUNTINGTON	21.3	23.1	20.2	47	41	50	1,008.4	955.1	1,005.3
	LAGRANGE	23.8	24.2	19.5	40	29	32	921.3	699.9	621.1
	NOBLE	22.1	23.4	19.6	35	34	38	794.5	783.2	741.3
	STEUBEN	13.5	14.3	10.8	38	29	35	485.3	404.3	374.2
	WELLS	19.6	22.4	20.3	51	47	54	1,008.6	1,055.5	1,091.1
	WHITLEY	21.8	22.2	21.3	42	39	43	918.0	874.2	911.6
	TOTAL	214.2	225.3	204.2	43.5	38.4	44.8	9,312.7	8,658.7	9,111.3
4.	CLAY	14.8	15.6	13.1	29	26	40	425.6	399.3	521.5
	FOUNTAIN	12.7	13.6	11.1	52	29	54	665.3	394.8	596.6
	MONTGOMERY	21.9	21.2	16.1	47	32	51	1,020.6	667.9	817.2
	OWEN	6.8	7.0	6.8	35	30	43	239.5	206.7	256.8
	PARKE	14.1	16.7	13.8	44	29	47	651.7	474.8	638.1
	PUTNAM	16.1	16.7	13.9	49	31	47	744.1	504.7	650.2
	VERMILLION	21.8	22.2	17.6	52	35	51	1,142.8	784.8	893.4
	VERMILLION	4.3	4.4	3.4	41	37	49	182.1	164.8	168.9
	VIGO	22.2	21.9	17.8	44	34	48	980.5	742.4	850.4
	WARREN	13.8	13.3	11.1	49	35	43	917.2	465.9	736.4
	TOTAL	197.9	194.2	131.1	49.3	32.5	48.8	7,138.6	5,335.2	6,241.5
5.	BARTHOLOMEW	21.5	22.1	17.9	45	37	46	971.7	829.8	819.5
	BROWN	15.5	14.4	12.9	52	31	55	811.4	583.6	708.2
	CLINTON	15.2	15.2	12.1	56	35	55	843.1	534.7	662.4
	DECATUR	15.1	17.2	14.1	38	41	47	573.9	711.2	659.6
	GRANT	13.1	13.3	12.4	53	41	54	698.7	549.9	715.6
	HAMILTON	18.6	19.3	18.2	56	39	52	928.7	748.8	838.4
	HANCOCK	10.8	11.6	9.1	58	42	55	583.3	485.7	499.1
	HENDRICKS	18.7	20.6	15.6	48	35	49	884.3	708.8	765.3
	HOWARD	18.3	12.8	19.3	53	37	54	956.1	468.9	987.4
	JOHNSON	13.8	14.7	11.8	47	34	45	614.2	492.8	983.7
	MADISON	22.9	25.8	21.5	51	38	54	1,176.1	999.9	1,148.4
	MORGAN	7.3	8.8	6.9	58	48	52	387.4	389.9	387.1
	PUTNAM	9.4	11.7	9.7	46	36	51	432.8	391.8	492.4
	RUSH	27.4	24.3	19.3	46	43	54	1,188.1	1,041.3	1,037.3
	SHELBY	25.1	26.9	22.4	42	37	48	1,057.8	1,006.3	1,182.2
	TIPTON	12.8	15.4	12.7	58	38	62	844.2	591.3	783.7
	TOTAL	264.4	272.4	224.9	48.7	38.1	52.2	12,176.5	10,481.9	11,737.5
6.	BLACKFORD	7.8	6.2	6.9	46	41	44	389.2	379.5	382.2
	DELAWARE	28.4	27.1	22.2	54	45	56	1,113.5	1,227.3	1,237.4
	FAYETTE	9.2	10.4	7.8	48	41	48	444.1	430.2	393.8
	HENRY	16.8	15.1	12.8	47	42	52	801.5	634.2	662.3
	JAY	25.4	27.7	17.5	44	41	45	1,143.9	1,145.7	783.9
	RANDOLPH	38.8	33.1	29.4	52	49	56	1,982.4	1,531.9	1,646.8
	UNION	9.4	10.6	9.3	51	45	48	482.7	448.8	433.9
	WAYNE	14.3	15.5	14.4	43	43	48	642.8	671.4	694.3
	TOTAL	131.4	147.7	121.8	48.7	43.4	49.2	6,397.6	6,463.8	6,448.6

Table 12. WINTER WHEAT: ACREAGE, YIELD AND PRODUCTION BY COUNTIES, INDIANA, 1975 AND 1976 REVISED, AND 1977 PRELIMINARY

DIST.	COUNTY	ACRES HARVESTED			YIELD PER ACRE			PRODUCTION		
		1975	1976	1977	1975	1976	1977	1975	1976	1977
		- THOUSAND ACRES -			- BUSHELS -			- THOUSAND BUSHELS -		
7.	DAVIESS	25.3	26.5	19.6	40	32	41	1,013.5	836.8	808.8
	HANDIS	9.3	10.4	8.8	35	23	37	326.8	235.5	326.1
	GIBSON	33.4	35.8	28.4	38	36	40	1,276.9	1,304.8	1,051.1
	GREENE	12.4	13.8	11.3	30	28	36	369.3	358.4	406.9
	KNOX	37.2	39.7	35.8	42	38	45	1,566.4	1,524.3	1,567.8
	MARTIN	1.9	1.9	1.7	35	31	39	66.3	58.8	68.8
	PIKE	5.8	6.2	5.8	36	33	36	208.5	201.4	179.2
	POSEY	43.7	41.7	34.8	40	33	42	1,750.5	1,356.7	1,506.9
	SPENCER	17.3	18.2	14.8	38	23	33	515.3	412.1	466.1
	SULLIVAN	28.4	29.9	22.9	41	35	44	1,164.8	1,059.7	1,025.7
	VANDERBURGH	8.8	8.8	7.5	37	37	47	251.4	249.3	350.8
	WARRICK	8.5	7.4	6.3	36	29	41	233.7	211.3	257.1
	TOTAL	229.2	238.7	195.5	38.3	32.9	41.1	8,743.6	7,853.5	8,025.5
9.	BROWN	8.2	8.2	8.2	29	33	38	5.4	8.5	7.6
	CRAWFORD	1.7	1.8	1.4	33	29	39	55.9	51.4	54.3
	FLOYD	8.9	8.9	8.9	34	25	29	30.5	22.2	26.0
	HARRISON	10.8	10.6	8.5	37	25	35	399.3	260.9	298.1
	JACKSON	13.1	14.8	11.7	38	27	38	497.8	372.1	442.5
	LAWRENCE	4.3	4.5	3.7	38	23	38	154.6	101.9	139.9
	MONROE	1.8	1.1	1.8	48	30	41	48.1	32.5	48.8
	ORANGE	5.6	5.5	4.1	37	28	36	207.1	151.6	155.1
	PERRY	3.7	4.8	3.3	26	25	27	95.8	98.4	88.7
	WASHINGTON	14.8	14.4	11.7	34	25	37	474.5	354.4	438.9
	TOTAL	99.3	97.8	48.5	35.5	25.5	36.2	1,948.6	1,491.9	1,681.9
9.	CLARK	6.2	6.6	5.6	41	27	32	254.7	175.4	178.4
	DEARBORN	1.6	2.4	1.7	33	30	39	52.8	70.9	66.8
	FRANKLIN	7.7	7.8	6.3	37	38	56	284.7	299.5	313.5
	JEFFERSON	4.3	4.2	3.6	35	30	35	150.2	124.8	125.4
	JENNINGS	6.8	7.7	6.3	31	27	37	209.5	204.7	232.8
	OHIO	8.7	8.7	8.5	26	23	27	18.8	15.9	13.4
	RIPLEY	13.8	15.1	12.8	33	34	41	453.4	505.4	514.2
	SCOTT	3.8	3.8	2.8	29	26	32	103.9	98.2	89.2
	SWITZERLAND	1.8	1.8	1.4	28	28	37	41.1	49.8	51.6
	TOTAL	46.3	49.9	48.8	33.9	30.8	38.8	1,567.9	1,537.6	1,583.7
	STATE	1,480.8	1,588.8	1,248.8	44.8	38.8	46.8	61,688.8	54,888.8	58,488.8

EXHIBIT 20

AFFIDAVIT OF LOYD R. JONES

Loyd R. Jones, being first duly sworn, states:

1. I am employed by the United States Department of Agriculture as the Executive Director of the Agricultural Stabilization and Conservation Service for Indiana.

2. As a part of the official duties of the Agricultural Stabilization and Conservation Service which is an agency funded and operating pursuant to federal law, records are kept concerning set-aside and diverted acreage of farmland for which farmers are partially compensated not to grow grain crops, which set-aside and diverted acreage can only be used for pasturing purposes. Such records are under my care, custody and control as a part of my duties as Executive Director.

3. Attached hereto are two pages which are true and correct copies of records kept and maintained by the Indiana State Agricultural Stabilization and Conservation Service, which in Column No. 9 indicate for each county within the State of Indiana, the total amount of acreage set-aside and diverted under this program and on the second page at the bottom of Column No. 9, the total of the acreage within the State of Indiana set-aside and diverted under this program for 1978 was 369,135.6 acres.

4. There were 5.9 million set-aside and diverted acres nationally in the 1978 Feed Grain and Wheat Program.

[Dated: March 7, 1979] /s/ LOYD R. JONES

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
COUNTY	No.	[illegible]	No.	Corn	[illegible]	[illegible]	Wh.	[illegible]	[illegible]	No	Corn	[illegible]	[illegible]	[illegible]	[illegible]
Lawrence	879	46447.5	309	11869.5			162.8	[illegible]	[illegible]		15610.5	[illegible]	10.0	450.3	3016.7
Madison	2023	165197.2	153	9307.6	—	—	1098.6	7298.4	2081.2	1516	79380.4	—	—	1367.1	5994.3
Marion	280	47090.8	46	2071.2	—	—	271.4	1518.0	453.8	734	30478.6	—	—	2628.6	2011.3
Marshall	1974	166327.5	274	[illegible]	[illegible]	—	2312.9	14058.0	8234.6	1425	68700.5	—	—	5304.9	3059.1
Martin	430	27384.0	167	9591.3	—	—	484.4	1263.1	1977.5	[illegible]	7175.0	—	6.8	403.3	1672.0
Miami	1454	147933.6	242	16180.4	88.9	—	832.7	7451.8	4825.8	1212	66000.0	100.5	—	1141.5	4836.0
Monroe	304	14051.0	79	3094.0	—	—	136.5	768.8	705.5	1046	48796.0	—	—	546.0	815.4
Montgomery	1851	212128.2	269	27399.3	—	—	3401.0	13300.5	5679.5	1552	75,000.0	—	—	1330.0	5336.0
Morgan	1121	85920.7	177	11350.0	—	—	1170.5	4510.7	2607.5	1434	70498.3	—	—	4011.0	2936.5
Newton	1039	134536.1	257	40782.9	13.0	—	523.7	7755.1	3730.9	1152	59008.0	—	—	420.0	1720.0
Noble	1780	129663.5	460	26413.0	2.4	—	3174.5	12615.5	6111.5	1105	39993.0	100.0	10.0	6.300.0	2400.0
Ohio	209	16647.8	42	1787.0	—	—	148.0	283.0	316.0	141	3086.0	—	—	1125.0	1067.0
Orange	754	45375.6	241	7918.4	—	—	394.6	795.6	2054.0	523	24934.5	20.0	—	1460.0	3177.7
Owen	925	52852.1	365	14345.4	33.5	—	2101.9	1743.2	2401.2	864	13901.5	—	—	312.5	1745.7
Parke	1363	124482.8	454	21824.2	100.9	—	4178.3	6825.6	7442.0	711	36705.2	19.3	—	4011.1	2132.5
Perry	491	33541.3	131	10430.6	12.6	30.5	1159.8	1401.3	1040.8	2417	30.0	20.6	2.6	1.8	1.0
Pike	1077	77814.1	439	28779.2	—	—	1140.7	1531.2	1604.6	1241	30482.8	—	—	1665.6	1192.0
Porter	1535	129901.0	208	14602.6	—	—	1732.6	495.0	2310.0	1035	61.000.0	—	—	1.0	0.0
Posey	1633	124079.9	396	21305.2	—	23.8	9437.9	18705.0	8610.7	1232	59697.8	—	1.4	13.266.2	3.0
Pulaski	1428	104516.0	438	47109.9	—	—	1214.0	8324.6	9074.7	1052	78452.0	—	—	3974.5	5460.8
Putnam	1490	132236.8	338	24771.2	5.1	—	1156.2	2.4.1.3	5200.4	1620	59669.2	40.0	—	4956.0	3414.2
Randolph	2640	196688.3	397	139.8.2	—	—	3904.1	17364.6	3499.6	1743	67045.0	30.0	—	13676.0	1412.0
Ripley	1875	134231.2	265	11372.1	—	—	1183.0	6767.6	2537.4	1810	36735.4	—	—	4058.4	3726.1
Rush	1423	118842.0	208	9787.0	—	—	804.0	6860.0	2056.0	1478	100,000.0	7.0	20.0	2.200.0	1.0
St. Joseph	1641	135880.4	362	24485.8	—	26.5	1930.2	10881.2	5752.1	1259	58000.0	183.7	2.5	6200.0	3750.0
Scott	734	46545.0	237	12186.2	—	—	410.8	3333.0	3612.2	497	11475.0	—	50.0	300.0	2500.0
Shelby	1930	152881.8	459	19256.6	—	—	1246.3	6280.2	5243.6	1777	103829.7	—	—	1813.6	5012.4
Spencer	1263	109796.1	342	17367.7	33.3	115.0	1301.6	12.374.1	3839.6	1011	32545.0	180.0	32.0	4855.0	3582.0
Starke	1245	110500.0	427	40182.1	19.5	—	625.1	11062.9	5393.1	818	29340.0	—	—	6.00.0	2502.0
Steuben	1213	87968.4	265	13445.0	—	—	1209.0	6458.9	3900.4	1098	42351.0	—	—	4434.0	1384.0
Sullivan	1532	134218.4	452	22853.3	7.4	—	994.3	12324.5	7455.2	1080	41512.6	—	—	7757.5	2049.5
Switzerland	810	17768.9	82	1758.7	—	6.0	116.7	882.1	3112.0	548	6000.0	12.0	3.0	1200.0	1.0
Tippecanoe	1696	149933.0	267	20091.4	—	—	1184.4	13855.1	4040.4	1579	86764.0	—	—	5.0.0.0	0.0
Tipton	1281	111659.8	96	3805.7	—	—	118.8	2694.9	714.2	1378	77000.0	—	—	4000.0	5004.8
Union	305	27198.4	67	4536.6	—	—	648.2	2173.1	1062.1	438	29859.2	—	—	3381.1	1143.1
Vanderburgh	970	73587.5	214	5790.8	—	—	—	4859.2	1436.8	866	52000.0	—	—	2200.0	2.0
Vermillion	935	79576.6	232	10215.6	5.4	—	1541.7	4003.7	3289.8	703	32420.8	26.2	—	1625.7	2017.5
Vigo	1570	111793.5	331	20730.8	104.2	81.1	3193.2	20.1.20	7125.9	1092	36750.0	3000.0	—	2.000.0	0.0
Wabash	1860	139385.5	161	9045.4	—	—	958.1	7596.5	2087.8	1499	65000.0	—	—	4358.0	4078.9
Warren	814	46490.9	238	23966.1	—	—	824.1	3012.8	2599.2	548	23000.0	—	—	1100.0	3947.0
Warrick	925	74531.2	227	13857.7	—	—	685.1	2421.6	2963.8	741	23014.0	34.0	19.0	1123.0	1761.0
Washington	1446	91010.4	342	16240.5	—	3.1.0	1154.2	2.1.0.6	3428.6	1054	32000.0	125.0	3.00.0	1.300.0	1300.0
Wayne	1287	123647.4	404	19878.1	—		2546.1	9205.1	3403.4	1323	45000.0	—	—	1000.0	0.0
Wells	1789	125.89.1	116	8942.0	—		1242.0	11.781.1	3151.5	1.1.2	3922.2	—	—	1000.0	611.4
White	1656	149280.2	201	11791.2	—	—	1532.0	3152.0	1.27.3	1.56	15.16.0.5		—	2000.0	0.0
Whitley	1284	125219.7	597	36819.2	—	—	3539.0	2167.0	7066.7	1132	52256.0	—	—	1142.7	2.1.1.5
Total	58,026	5,311,845.9	18,395	1,209,274.2	2,[illegible].2	338.1	16,190.[illegible]	[illegible]	113,432.[illegible]	41 [illegible]	2,515,110.0	4, 0.11.1	677.7	223,011.1	0.[illegible]
State [illegible]	122,897	9,211,045.9	24,618	1,889,135.2	2,1[illegible]	744.9	152,010.	116,[illegible]	369,135.6	104,799	4,1[illegible]	1,02.6.6	2.1573	533,241.7	3,140,93[illegible].2

County	Number	Acres	Number	Corn	Soybeans	Barley	Wheat	Hay and Grain	Oats	Number	Corn	Soybeans	Barley	Wheat	Hay and Grain
Adair	1917	148,340.0	290	28,158.0	13.0	--	3111.0	15,270.0	2,572.0	1627	34,545.0	140.0	--	1218.0	29,760.0
Allen	3126	134,440.0	607	20,883.0	8.0	--	2279.7	28,734.3	5,835.5	2519	55,163.0	--	--	1178.0	24,814.4
Bartholomew	1485	139,780.0	340	21,321.7	31.3	6.4	3733.1	9918.3	2,855.1	1332	43,434.0	37.0	--	654.1	2,042.0
Benton	1311	133,394.0	340	21,161.5	--	--	3150.0	9,161.0	1,855.0	1,556	39,832.0	14.0	--	640.1	1,512.0
Blackford	831	70,852.5	128	5183.5	--	--	1780.5	15,317.1	1,462.1	717	12,806.0	--	--	412.1	2,790.20.0
Boone	1859	175,952.5	399	17,373.6	--	--	1336.7	14,675.3	4,062.3	1430	46,685.0	--	--	1011.5	1,247.0
Brown	212	8554.5	59	1578.6	--	--	--	146.2	345.8	153	2,518.9	--	--	--	220.3
Carroll	1540	134,435.1	212	15,877.1	--	--	638.9	8032.8	3,472.1	1328	42,707.7	--	--	976.0	11,295.5
Cass	1778	120,735.5	278	17,134.4	--	--	1375.5	13,570.2	4,335.7	1,500	40,000.0	--	--	1032.0	4,000.0
Clark	986	49,172.0	215	8038.0	7.0	15.5	699.2	3467.9	1,604.6	1653	16,000.0	60.0	13.0	2012.0	1,051.6
Clay	1699	117,531.1	395	16,621.2	27.0	--	3276.2	3,011.0	2,311.4	1,301	31,492.7	--	--	1147.7	2,991.6
Clinton	1762	107,353.3	167	11,072.1	--	--	973.1	5,215.3	3,453.4	1575	33,762.0	--	--	1232.0	6,190.0
Crawford	373	11,245.0	116	3662.6	--	--	57.7	138.5	1,441.1	1139	3,441.1	--	--	126.7	1,036.1
Daviess	1900	191,173.1	525	39,751.6	133.6	--	4113.4	10,819.3	2,141.1	--	46,531.1	33.0	--	1392.1	2,624.1
Dearborn	692	32,052.4	156	3,249.1	9.0	--	361.1	1,496.2	1,553.1	536	15,96.9	7.0	12.0	1251.0	1,156.0
Decatur	1206	93,332.1	124	10,367.6	--	--	571.5	2,890.7	2,061.2	1267	110,685.5	75.0	178.6	5311.4	1,176.2
DeKalb	1918	140,364.0	569	24,040.0	--	--	5185.0	119,156.0	6,331.0	1500	40,000.0	--	--	1000.0	12,490.0
Delaware	1746	147,287.3	235	10,051.3	--	--	2196.3	7042.0	2,511.1	13.3	64,000.0	20.0	--	1000.0	1,200.0
Dubois	1271	97,362.2	458	29,447.6	98.5	186.4	2405.2	5,007.1	6,291.9	812	21,672.0	109.0	305.0	1125.0	2,239.0
Elkhart	1306	101,655.0	142	8721.0	3.7	--	420.1	1,401.1	1,814.7	1,164	5,000.0	3.0	3.0	1251.0	1,250.0
Fayette	635	43,254.9	91	5,462.0	--	30.0	54.7	1,519.4	1,311.7	344	32,667.2	--	21.0	292.9	2,256.6
Floyd	183	9757.3	25	1035.6	--	--	167.4	321.0	2,994.3	151	1,630.0	35.0	2.0	990.0	1,250.0
Fountain	1479	161,324.4	387	25,610.6	--	--	1374.6	22,568.7	6,154.8	1092	37,626.1	--	--	1178.4	4,626.4
Franklin	1002	63,275.5	119	3,945.1	--	10.0	417.4	1512.3	7,017.2	833	22,500.0	40.0	30.0	1002.0	12,000.2
Fulton	1520	153,725.5	513	41,366.9	--	--	2068.9	19,478.2	7,151.8	1003	43,332.2	--	--	1241.4	2,038.6
Gibson	2020	194,460.1	401	30,107.1	--	--	3704.6	14,710.1	6,401.7	1,734	72,816.0	69.4	14.0	1556.0	52,413.2
Grant	1743	124,817.1	170	3694.3	--	--	1251.5	2,255.8	1,359.1	1990	63,680.0	--	--	1011.0	2,256.0
Greene	1341	147,291.8	314	25,160.8	--	--	1534.7	7683.2	5,611.0	1031	46,693.0	130.0	--	1245.0	2,190.0
Hamilton	1586	145,248.8	90	5942.1	--	--	549.8	4755.6	1429.3	1476	56,832.0	--	--	1765.0	52,419.0
Hancock	1223	111,630.5	237	9830.3	--	--	849.7	5109.2	2,057.5	1072	34,954.6	--	--	1387.5	4,749.3
Harrison	1413	124,992.0	320	8001.0	31.6	131.4	1431.1	3,121.1	1,120.2	--	1,000.0	--	--	1000.0	--
Hendricks	1983	129,224.1	118	9815.7	--	--	1225.5	1033.1	2,317.4	332	5585.0	--	--	1017.7	1,178.4
Henry	1828	141,926.4	158	8085.3	--	--	951.7	2,245.6	2,121.5	1468	62,286.0	--	--	1643.1	5,113.6
Howard	1421	73,452.0	118	7001.2	--	--	601.6	5876.4	1,573.4	1395	62,647.5	--	--	1131.5	1,225.1
Huntington	1782	139,109.0	247	11033.7	--	7.0	2078.8	13,461.8	2,539.0	1475	57,109.9	--	--	1872.4	5,992.2
Jackson	1540	139,540.9	472	32,818.2	138.6	13.0	2705.9	10,751.8	6,994.4	1823	46,403.3	268.0	58.0	1358.7	3,168.6
Jasper	1626	135,691.1	518	37,224.0	--	--	1239.3	33,505.5	12,619.5	1174	30,000.0	--	--	2000.0	4,000.0
Jay	1806	160,409.9	360	22,780.9	84.9	--	5095.5	21,042.1	4,111.2	1446	40,534.5	54.0	--	1311.1	2,000.0
Jefferson	1151	93,148.0	140	5946.3	--	5.0	170.6	1558.0	1,407.6	1011	13,300.0	20.0	300.0	1877.8	1,230.0
Jennings	1223	107,333.4	360	15,716.5	--	--	516.6	4,073.2	3,132.2	767	11,000.0	--	--	1000.0	1,000.0
Johnson	1243	109,477.1	65	3018.1	--	--	318.1	1218.4	1,646.7	1188	42,000.0	--	35.0	1000.0	2,160.0
Knox	1724	130,355.1	563	51,394.4	32.0	--	10042.2	21,345.5	12,293.3	1221	62,564.7	95.5	--	1731.1	1,1[illegible]
Kosciusko	2157	171,742.0	351	25,476.1	--	--	1937.3	8,656.3	5,942.1	1132	78,771.0	--	--	1811.0	2,210.0
Lagrange	968	82,672.1	142	11,449.1	--	--	1398.1	4,192.9	2,530.8	527	40,421.1	200.0	--	1122.0	1,[illegible]
Lake	4054	284,324.8	342	21,850.2	--	--	4[illegible]	13,201.3	6,534.1	812	42,584.0	--	--	1755.3	1,[illegible]
LaPorte	1805	215,205.0	436	18,341.6	--	13.0	2632.1	10,237.1	4,424.4	1369	24,000.0	50.0	30.0	1586.0	2,[illegible]
	64,871	5,[illegible]	13,223	1,035,[illegible]	621.6	404.8	81,526.0	785,102.0	310,[illegible]	56,692	2,353,411.1	2815.5	1,760.1	[illegible]	9,715,751.1

EXHIBIT 40

REVIEW OF RECLAMATION PLANS

UNITED STATES DEPARTMENT OF AGRICULTURE

SOIL CONSERVATION SERVICE
5610 Crawfordsville Road, Suite 2200, Indianapolis, Indiana 46224

September 20, 1978

ADVISORY—CONS—IN—13

From: Buell M. Ferguson, State Conservationist

Re: Plan Review for Restoration of Prime Farmland

The Secretary of Agriculture, under the Surface Mining Control and Reclamation Act of 1977, has assigned responsibility for providing assistance to state surface mine regulatory agencies to the Soil Conservation Service.

The Soil Conservation Service will receive requests from the Jasonville office of Indiana Department of Natural Resources, Reclamation Division, to review reclamation plans for reconstruction of prime farmlands. These requests will be received by field offices in the counties where mines are located. Field offices will be responsible for making the review and returning the plans to the Jasonville office of IDNR within 15 days after receiving them.

The attached procedure is to be used when reviewing plans for reconstruction of prime farmland. The review and comments will be limited to the prime farmland aspects of the plan. It is anticipated that most of these reviews can be made in the office without field review.

Retain this advisory and the attached procedure until further notice.

/s/ Buell M. Ferguson
State Conservationist

Attachment

PROCEDURE FOR REVIEWING PLANS FOR THE RESTORATION OF PRIME FARMLAND (PL-95-87)

To adequately review a plan it must contain the necessary items to evaluate the reconstruction of prime farmland. The review will be made on plan content only, *without any assumptions* as to the operator's intent. The review and comments will be limited to the prime farmland aspects of the plan. If it cannot be determined by reviewing the plan that these items are adequate, it should be so stated in the comments.

The following is a list of items that need to be checked on each plan:

1. When stockpiling of soil horizons is necessary to accomplish soil reconstruction separate stockpiles will be needed for A horizon soil material and for the mixed B and C horizon soil material, or for other suitable plant growth material. A separate stockpile area will be needed for the C horizon soil material if this material would adversely affect the productivity of the soil or if separate handling of the C horizon would enhance productivity.
2. Where it is found that a particular horizon or combination of horizons or field identifiable units have the best potential of enhancing post-mining productivity, that unit or horizon shall be saved and replaced.
3. The average major horizon thickness for soil reconstruction should be shown on the plan and needs to agree with the major horizon thicknesses for the original map unit.
4. The plan should specify that soil reconstruction of prime farmland will be made with the original sequence and thickness of natural A, B & C horizons to the depth of the root zone of the original soil, but it is not necessary to exceed 60 inches.
5. The mechanical equipment designated to be used for restoration is capable of removing and replacing the designated horizons to carry out the plan.

6. The plan needs to show that restoration will be to the approximate original contour. If restoration will not be to the original contour, exceptions must be identified and determined to be adequate.
7. A determination must be made that the restoration will be completed in such a way to permit the original (pre-mining) land use, or better.
8. The grading plan needs to allow for some settling of the soil so that positive surface drainage is provided on all areas that are restored.

EXHIBIT 41

AFFIDAVIT OF WILLIAM RICHARD BYRNES

Comes now the affiant, and upon his oath deposes and says as follows:

1. That he has been employed by Purdue University since 1962, and since 1975 has held the rank of Professor and Assistant Department Head of the Forestry and Natural Resources Department.

2. That he received his Ph.D. in Agronomy from Penn State University in 1961.

3. That he is familiar with the Indiana laws relating to the reclamation of surface mined areas and the use of lands reclaimed following surface mining operations in Indiana.

4. That the first Indiana surface mining statute was enacted in 1941, and that the principal land utilization of surface mined areas was in trees and tree species.

5. That since the enactment of the 1967 Indiana Surface Mining Law there has been a shift in emphasis by the State of Indiana from forest land to range land, pasture and hay and some row crop.

6. That the land use determinations made for the reclaimed areas in the State of Indiana by the State of Indiana have been valid determinations for the lands involved.

7. That the area in which surface mining operations are conducted in Indiana is suited for forest/range land utilization as well some lands which are suited for agricultural purposes.

Further affiant sayeth not.

[Dated: April 18, 1979] /s/ WILLIAM R. BYRNES

EXHIBIT 45

MINUTES OF THE STREAM POLLUTION CONTROL BOARD MEETING
HELD IN ROOM A-419,
STATE BOARD OF HEALTH BUILDING
INDIANAPOLIS, INDIANA
June 19, 1979—SIXTH MEETING

* * *

ABANDONED MINES DOCUMENT
WCIEDD—REGION 7

5. Mr. Michael Harding explained that at the May 15, 1979, meeting the Stream Pollution Control Board deferred action on the "Analysis of Abandoned Coal Mines in West Central Indiana," document prepared under Section 208 Water Quality Management Planning for Region 7. The Board directed the staff to meet with representatives of the Coal Industry and the Region 7 staff to discuss proposed changes to the certification recommendation. A meeting was held on May 31, 1979. As a result of the meeting, the following wording should be added to the certification recommendation such that the Abandoned Mines document will be certified with the understanding that:

   1) The only mine drainage problems documented were caused by coal mines abandoned prior to 1967 Indiana Surface Mine Act (IC 13-4-6 et seq.).

   2) The report suggests feasible techniques that may be used as a base for devising individual site plans.

   3) The priority guidelines are set up on a "four priority system" and that sites within the four priorities are not listed in order by magnitude of water quality impact.

4) Further refining of the Best Management Reclamation Practices be done in consultation with property owners.

* * *

After considerable discussion, Mr. Andrews made a motion to accept the staff recommendations and certification of the WCIEDD Abandoned Mines Document. The motion was seconded by Dr. Huegli and passed unanimously.

* * *

/s/ ROBERT A. HOLT
Chairman

/s/ ORAL H. HERT
Technical Secretary

Defendants' [Appellants'] Exhibits[3]

REPORT OF 208 WATER QUALITY PROGRAM, AN ANALYSIS OF ABANDONED COAL MINES IN WEST CENTRAL INDIANA AND SUGGESTED RECLAMATION TECHNIQUES (WITH AN INVENTORY OF ACTIVE STRIP MINES)

June, 1978

* * *

9. *Except for some sedimentation problems, active strip mining in West Central Indiana is causing only minimal surface water quality problems.* [Page 216.]

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[3] See note 2 *supra*.

EXHIBIT A

AFFIDAVIT OF DONALD F. SMITH

Donald F. Smith, being duly sworn, deposes and says as follows:

(1) I have a Bachelor of Science Degree in Agricultural Engineering from Texas A & M University and a Master of Engineering in Agricultural Engineering from Cornell University. I am an Agricultural Engineer for the Division of Technical Services and Research for the Office of Surface Mining, United States Department of the Interior, Indianapolis, Indiana. As an Agricultural Engineer I am knowledgeable in the areas of water, soil, and agronomic systems and their relationships in providing a productive environment for plant and animal life. This includes knowledge in the science of the reclamation of disturbed lands.

(2) The mining of "steep slopes", as defined in the Surface Mining Control and Reclamation Act of 1977 and regulations thereunder, is rarely encountered in Indiana. Steep slope mining refers to contour mining as found in the Appalachian Coal Basin. The Eastern Interior Coal Basin, which underlies a portion of Indiana, has flat or gently rolling terrain with occasional steep slopes. Only 2 percent of Indiana's coal reserves are located in steep slope areas. Neither AMAX Coal Company nor Peabody Coal Company are currently mining on steep slopes in Indiana.

(3) A current study by Argonne National Laboratory, an independent research laboratory, entitled, "Projected Acreage of Prime Farmland to be Disturbed by Coal Mining in the Cornbelt, 1980-2000", projects that in the 15 surface coal producing counties in Southwestern Indiana, approximately 40,000 acres of prime farmland will be disturbed by surface mining over the next 20 years.

(4) Further, the State imposes no requirements other than grading, to assure that strip mine operators prac-

tice proper soil handling and soil segregation techniques along with proper soil treatment and revegetation practices all of which are necessary if land is to be returned to its pre-mining productive capability.

(5) An information system, also developed by Argonne National Laboratory, "Surface Mining and Land Reclamation Information System", (SUMLARIS), which extracted data directly from surface coal mining permit applications and reclamation plans in the State of Indiana for the year 1976, showed that although reclaimed mine lands were being graded to slopes which would accommodate row crop agriculture, the permittee had no intention of returning the lands to that use. Of the 69 mining sites which had a pre-mining land use of row crop, only four were proposed to be returned to row crop agriculture. The others were to be returned to various other uses.

(6) a number of scientific studies conducted by experts in the field, including those listed below, demonstrate that the technological capability exists for an operator to return prime farmland to its pre-mining productive capability. Based on studies of this type, it is clear that operators can make a showing that prime farmland can be returned to its pre-mining productive capability.

(a) In "Use of Soil Materials on Spoils—Effects of Thickness and Quality" by J.F. Power, et al., North Dakota Agricultural Experiment Station, Reprint No. 891, from September—October, 1976, Farm Research, Vol. 34, No. 1, researchers concluded that requirements for saving and respreading soil material after mining will meet the needs of most crops grown.

(b) In "reclamation of Coal-mined Land in the Northern Great Plains" by J.F. Power, et al., Journal of Soil and Water Conservation, March—April 1978, the authors concluded that soil resources can be saved and respread without diminishing their ability to produce equal yields.

(7) These studies include extensive research in Illinois' cornbelt soils, which are similar to Indiana's cornbelt soils, by a number of researchers. Among those researchers is Alten F. Grandt, Director of Reclamation, Peabody Coal Company, who in reviewing research and after conducting studies has concluded that:

(a) corn and soybeans can unquestionably be grown on land that has been stripmined for coal;

(b) mined lands can be returned to a high level of agricultural productivity; and

(c) lands can be returned to equal or higher levels of productivity after mining.

Among Mr. Grandt's studies are:

"Reclaimed Mined Land in Illinois for Row Crow (sic) Production" by Alten F. Grandt, Director of Reclamation, Peabody Coal Company, published in the Journal of Soil and Water Conservation, September—October, 1978;

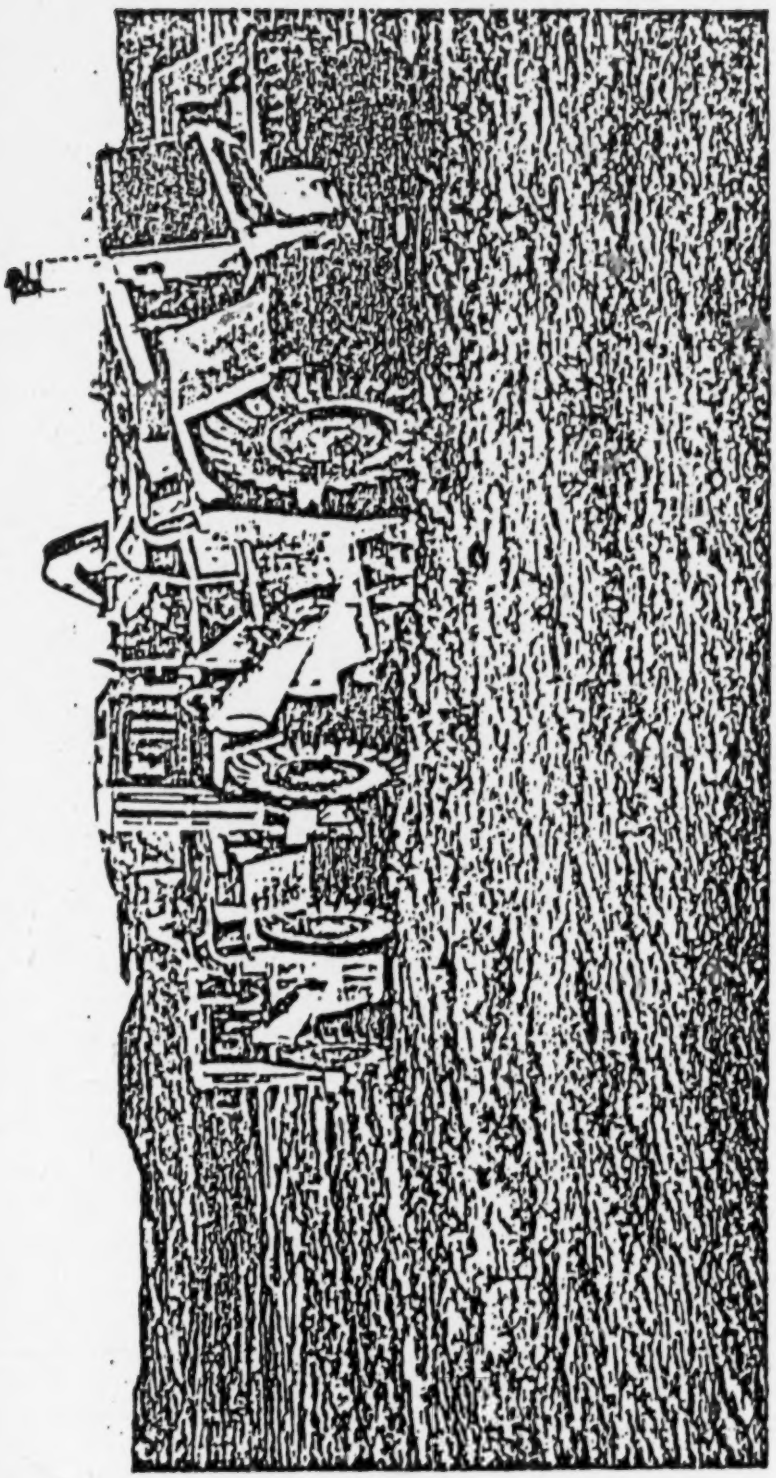
"Mined-land Reclamation in the Interior Coal Province" by Alten F. Grandt, Director of Reclamation, Peabody Coal Company, published in the Journal of Soil and Water Conservation, March—April, 1978; and

"Reclaiming Illinois Strip Coal Land With Legumes and Grasses", by A.F. Grandt, and A.L. Lang, University of Illinois, Agriculture Experiment Station, Bulletin 623, April 1958.

(10) Also, throughout the legislative history of the surface mining initiative, industry asserted time and again that it is technologically possible to return prime farmland to its pre-mining capability. John A. Conlin, a plaintiff herein, representing AMAX Coal Company, wrote the attached letter to the Honorable Dennis T. Avery, an Indiana legislator, in which he stated that "the coal industry is quite capable of returning all surface mined land to pre-mining productivity levels. In some instances, actual improvements have been noted."

(11) The prime farmland provisions of the Act and regulations can be accomplished by using readily available construction equipment such as pan scrappers, bulldozers, dump trucks, and graders. The compaction requirement of the interim regulations, section 716.7(g)(5)(i), 43 Fed. Reg. 62695, can be achieved by laying down the A and B horizons, separately, in thick layers and avoiding excessive vehicular traffic over that area. It is a common farming practice to deep till the soil to alleviate adverse compaction problems. This practice may be used by the operators. In addition, dump trucks can end dump the A and B horizons, separately, and small bulldozers can push the topsoil into its final configuration.

[Dated: April 17, 1979] /s/ DONALD F. SMITH



Removing topsoil before stripping.

AMAX COAL COMPANY
A DIVISION OF AMAX INC.
105 SOUTH MERIDIAN STREET, INDIANAPOLIS, INDIANA, 46225 [317] 266-2626
JOHN A. CONLON
DIRECTOR—GOVERNMENT RELATIONS

March 18, 1977

The Honorable Dennis T. Avery
State House
Indianapolis, Indiana 46204

Dear Dennis:

We have just learned that the Carter Administration intends to support an amendment next week to H.R. 2, Congressman Udall's anti-strip mine bill, which would place a moratorium on strip mining in so-called prime agricultural areas in the Midwest. If enacted, such a proposal would have the gravest catastrophic effect on Southwestern Indiana. The attached chart indicates which of our mines in Indiana would be affected and the financial loss which would be suffered by mineworkers and local businessmen as well as loss of taxes to the counties and the state.

Beyond the economics, such a moratorium is unnecessary from a technical and scientific know-how standpoint. On both counts, the coal industry is quite capable of returning all surface mine land to pre-mine productivity levels. In some instances, actual improvements have been noted. Indiana Department of Natural Resources records indicate that for the permit period from 1976-1977, AMAX Coal will mine 1652 acres out of which only 707 acres were either being used for row crop agriculture or had such capabilities prior to mining. Under our reclamation plan we have filed with the state and for which we have given bond, we will be returning 1052 acres to row crop standards—an almost 50% increase in row crop acreage!

A moratorium for five years, as is being currently proposed, would have the gravest economic consequences for the thousands of Indiana coal miners and their

families. Moreover, the ripple effect of such a ban would be felt throughout the entire state. We urge you to immediately communicate your opposition to such a proposal to Congressman Phil Sharp, who is a member of Udall's House Interior and Insular Affairs Committee. Copies of your communication should go to President Carter, Secretary of the Interior Cecil Andrus, Congressman Morris Udall, and the entire Indiana Congressional delegation. Addresses for these individuals are enclosed for your reference.

If you have any questions at all on this matter, please feel free to get in touch with me or Geoff Emerson immediately. Thank you very much for your help.

Sincerely,

John A. Conlon

JAC:tmr
Enclosures

REFERENCE 1

PROJECTED ACREAGE OF PRIME FARMLAND TO BE DISTURBED BY COAL SURFACE MINING IN THE CORN BELT, 1980-2000

David P. Bernard
Division of Environmental
Impact Studies
Argonne National Laboratory
Argonne, Illinois

Introduction

In April 1977, President Carter submitted to Congress a National Energy Plan (NEP) which called for increasing annual coal production to more than one billion tons by 1985. Among the many environmental concerns associated with accelerated coal extraction is the potential for an increasingly large amount of agricultural land—specifically, prime farmland—to be disrupted by the mining process. Despite the vastness of our country, prime farmland comprises but 15% of the total land surface, and yet 17% of the strippable coal is beneath this land.

Concern for the susceptibility of farmland to surface mining is by no means confined to recent times. In 1939, Hanna and Vandervliet pointed out that in certain Illinois counties, strip mine companies owned or controlled land which on the average had a better productivity index (on a scale of 1 to 10) than the remainder of the land in the given county. This led them to suggest that lands in strippable areas should be rated according to their agricultural value and that mining should be prohibited in the better farming areas. A 1976 report by Ostendorf and Gibson contained the same message, again for Illinois. In 1977, Interior Secretary Andrus proposed to Congress that a national moratorium on mining prime farmland be imposed for a period of five years to allow a study to be conducted into the impacts of surface mining on prime farmland.

In passing the Surface Mining Control and Reclamation Act (SMCRA) of 1977, Congress rejected the suggestion for a moratorium on mining prime farmlands, indicating that as long as a given parcel of land could, and would, be restored within a reasonable amount of time to its original level of productivity, mining could commence at that site. Consequently, although numerous authors (e.g., see References 6-9) have indicated concern over the agricultural impact which can accompany coal extraction, it is now important to begin a dialogue in which the reality of surface mining on prime farmland is considered in quantitative terms. As a first step toward this goal, this report presents a numerical analysis of the acreage of prime farmland which could be affected by surface coal extraction in the Corn Belt during a 20-year period, 1980-2000.

Method

The Corn Belt farm production region was chosen for this study because all five states—Ohio, Indiana, Illinois, Iowa, and Missouri—contain mineable coal and are important producers of agricultural products. To achieve as high a degree of accuracy as possible, modeling was carried out at the county level; however, the results are of greatest value when considered at the regional level.

Direct prime farmland disturbance (the acreage immediately over the coal being removed) at a county level was calculated using the equation:

$$P = \left[\left(\frac{e \cdot s}{d \cdot t}\right) \frac{1}{r}\right] \frac{p}{c}$$

where P = prime farmland disturbed annually, in acres
e = projected total yearly coal extraction, in tons
s = fraction of total coal extraction to be surface mined
d = coal density, in tons/acre-foot
t = seam thickness, in feet

r = recovery rate, fraction of total coal mined

p = county prime farmland area, in acres

c = total county |~~prime farmland~~| area, in acres

The assumptions were: (1) the bulk density of coal throughout the Corn Belt region is 1800 tons/acre-foot, (2) coal surface mining in this region is 98% efficient in removing coal from the seam, (3) there is but one major seam per mining operation which may contain partings, (4) the coal and prime farmland are homogeneously distributed throughout the county, (5) prime farmland will not be differentiated and avoided by surface mining operations, and (6) the SEAS model data for future coal mining reflect the NEP and are an acceptable indication of potential future mining activity when considered at the regional level. According to Treworgy et al., the bulk density of Illinois coal is around 1790 tons/acre-foot, but for most calculations involving bituminous coals, a value of 1800 tons/acre-foot is considered acceptable. On the average, current surface mining operations remove 80 to 90% of the coal, but future methods are expected to be more efficient, hence 98% efficiency. Although there are multiple seams in the vertical profile of most mining areas in the Corn Belt, usually only one is mined at a time, because the others may either be uneconomically thin or too deep. The best available information on prime farmland distribution is given at the county level; therefore, calculations combining data for coal and prime farmland resources inherently have the assumption that each of these two resources is homogeneously distributed throughout the counties being considered. The flat land surface and the lack of woody vegetation and buildings make prime farmland sites attractive to mine operators; thus, without economic or regulatory disincentives, these lands are often considered choice sites for mining operations. Furthermore, as noted earlier, the SMCRA has made it possible for operators to legally mine these lands, provided certain regulations and performance standards are met. Finally, the SEAS data are considered to be

reasonable forecasts of future coal production, as shown by a comparison between them and two other sets of estimates (see Reference 12).

In addition to direct disturbance of land, surface mining also results in indirect land disturbances at the mine site such as: haulage and service roads, overburden and topsoil storage areas, sediment retention ponds, and coal storage piles. Together, the direct and indirect land disturbances give an estimate of the total acreage affected. Based upon data of the Council on Environmental Quality and the EPA, it is assumed that the total acreage affected in the Corn Belt is a factor of 1.2 higher than the acreage directly disturbed there. Thus, to arrive at an estimate of the total land disturbed, an additional acre is assumed to be affected by the above-named land uses for every five acres directly disturbed.

Results

During the 20-year period 1980-2000, the level of [surface] coal production in the Corn Belt states is expected to increase, reaching 130 million tons per year by the turn of the century (Table 1). If this level of coal production is reached at the rate predicted in the model, by the year 2000 some 433,000 acres of land and 122,000 acres of prime farmland are forecast to have been affected by the previous 20 years of surface mining for coal (Table 2). This is equivalent to 0.2% of the total prime farmland acreage in this farm production region.

It is important to note that the relationship between non-prime farmland disturbance and prime farmland disturbance is not linear. As seen in Table 2, Ohio is projected as having the largest acreage of land disturbed, but the amount of prime farmland forecast for disturbance is lower than for several other states. This is because the coal producing areas of eastern Ohio do not contain as much prime farmland as do the coal producing areas of other states, such as Illinois.

To lend perspective to the analysis of the prime farmland acreage disturbed by surface coal mining in

the Corn Belt, preliminary estimates have been made of the future acreage which could be affected if the present rate of prime farmland conversion to urban, roadway, and water uses (Table 2) continues at a constant rate. Data used to extrapolate the acreage devoted to urban, built-up, and water areas were taken from Lee and represent historical events of the period 1967-1975; definitions of the land use terms follow criteria published by the U.S. Soil Conservation Service. Presently, over 1.3 million acres of prime farmland are devoted to "irreversible" land uses; if current trends continue, another 3.4 million acres could be affected during the next 20 years (Table 2).

Discussion

Estimates of the prime farmland acreage that could be disturbed by future surface coal mining should be viewed as trend indicators rather than absolute predictions, for considerable uncertainty still surrounds the coal industry and the legislation affecting it. For example, the Clean Air Act Amendments of 1977, the Surface Mining Control and Reclamation Act of 1977, and the Federal Coal Leasing Program Amendments of 1977 are likely to affect coal mining throughout the remainder of this century; however, the full impact of these legislative actions has yet to be registered by the industry. Furthermore, productivity in the coal industry is in part related to other factors such as the supply of foreign oil, strength of the national economy, and dependability of the labor force servicing the coal mines and shipping routes. To ignore the possibility that future changes in these areas could occur is unrealistic, but to predict these changes is impossible. Consequently, the forecasts in this paper, although made as realistically as possible, must be regarded with caution.

Reconsideration of several assumptions in the equation suggests that the acreage forecasts may be too low. For example, the bulk density figure of 1800 tons per acre-foot and the 98% extraction efficiency are probably too

high, yielding estimates of the direct acreage affected which are too low. In addition, the factor of 1.2 used to estimate total acreage disturbed is conservative, since the National Academy of Sciences estimates a factor of 2.0 and the environmental statement for the Star Lake-Bisti coal mining project in northwestern New Mexico uses a factor of 1.56. However, both of these studies refer to western mining operations, and thus the factors used may not be appropriate for operations in the Midwest.

In most counties, neither coal nor prime farmland is homogeneously distributed. For this reason the county-level data may be inaccurate, because although a county may contain a substantial acreage of prime farmland, mining operations in that county may be entirely on

Table 1. Land Area and Projected Surface Coal Mining Activity in the Corn Belt

State/Area	Land Area (10^6 acres)		Projected Surface Mining (10^6 tons/year)		
	Total	Prime Farmland	1980	1990	2000
Illinois	35.7	20.6	24.8	30.6	38.2
Indiana	23.1	14.0	23.4	29.9	37.3
Iowa	35.8	18.6	<1.0	<1.0	<1.0
Missouri	44.2	12.2	5.8	9.4	14.8
Ohio	26.2	11.0	28.8	33.5	41.4
Corn Belt	165.0	76.8	83.0	103.9	132.4

Table 2. Projected 20-Year Total Land Disturbance by Surface Coal Mining and Urbanization in the Corn Belt, 1980-2000

State/Area	Land Disturbed (10^3 acres)		
	Total	Prime Farmland	
		Mining	Urban and Water Use*
Illinois	84.6	38.6	864.4
Indiana	91.0	10.6	547.2
Iowa	1.6	0.8	549.6
Missouri	73.3	21.4	627.8
Ohio	183.1	21.0	804.1
Corn Belt	433.6	122.4	3393.2

*Based on data of Lee (Reference 14).

non-prime farmland. For example, in eastern Ohio, much of the mining is done along ridge contours where the operation is unlikely to encounter prime farmland; yet because there is prime farmland in the valley below, our calculations for that county would indicate surface disturbance of some prime farmland by the mining operation. It is likely, though, that throughout the remainder of the Corn Belt in counties where much of the land is prime farmland, the non-prime farmland may also be of good quality—viz., a significant portion of the non-prime farmland disturbed may be valuable cropland.

Consideration of data in Table 2 results in the conclusion that if current trends continue, more prime farmland will be disturbed by urbanization and water use than will be affected by surface mining for coal. Because there was a period of rapid expansion in the Corn Belt land acreage devoted to water uses such as stock ponds, flood control projects, and impoundments during the late 1960s and early 1970s, it is probable that the rate of land conversion to water use will not continue linearly as has been assumed for this paper. Nevertheless, land conversion to water use accounted for less than 25% of the total land conversions during the 1967-1975 period; thus if urban growth continues, the trend that these estimates described will still be adequately represented. Furthermore, since the prime farmland acreage projected to be affected by urban and water use is on an order of magnitude higher than that forecast as being affected by mining, the conclusion that more prime farmland is affected by urbanization and other such uses than by surface mining for coal appears correct.

The purpose of giving special recognition to prime farmlands in P.L. 95-87 was to afford added protection to the nation's best farmland, and to ensure that these lands would not be lost from the cropland base. Although it is unlikely that all of the land affected by mining—e.g., sediment ponds and final-cut reservoirs—will be reclaimed, a substantial portion of the prime

farmlands affected will at least initially be returned to cropland use. The ultimate fate of these lands, after the performance bond is released by the regulatory authority upon completion of successful reclamation, is still unknown. Past reclamation practice has led to a substantial shift of former cropland to pasture, grazing, or forested land use (see Reference 17). Theoretically, however, the new permanent regulations promulgated by the Office of Surface Mining will promote the reuse of prime farmland for crop production by clearly demonstrating that the 48 inches of "reconstructed topsoil" will support crop growth at economic levels for a minimum of three consecutive years. Thus, assuming successful reclamation to crop use in a long term (> 20 years) context, surface mining for coal may be viewed as a temporary land use—a feature that distinguishes it from urban and water use which are considered irreversible.

To complete the analysis of land affected by surface mining, it would be necessary to consider the remainder of the surface mining industry such as sand and gravel, limestone, and metallic and nonmetallic mineral mining operations. The acreage of prime farmland affected by underground mining (both directly through surface disruption and indirectly through subsidence) should also be investigated. Finally, studies into the feedback loop between coal mining and the expansion of railroad lines, electrical switching stations, towns, and highways should begin to add further to our ability to quantify indirect land disturbances associated with surface coal mining.

Summary

In the 20-year period 1980-2000, 433,000 acres of land in the Corn Belt are forecast to be affected by surface mining for coal. Of this land area, 122,000 acres are expected to be prime farmland, which is equivalent to 0.2% of the total regional prime farmland area. During this same period, over 3 million acres of prime farmland could be affected by urban expansion, road building,

and water projects if current trends continue. Overall, the acreage of prime farmland affected by mining is significant, especially at the local level. Considering the small amount of prime farmland which has successfully been returned to crop production, the resulting challenge to reclamation specialists is large. [References omitted.]

EXHIBIT B

AFFIDAVIT OF DONALD E. McCORMACK

Donald E. McCormack, being duly sworn, deposes and states:

1. I am the Director, Soil Survey Interpretations Division, Soil Conservation Service, United States Department of Agriculture. My division is responsible for leadership in the use of soil surveys and how the nature of soil affects the use and management of land.

2. I received a doctorate degree in soil science from the Ohio State University in 1973 and I have published approximately twenty-five articles on soil performance and soil behavior. Among my publications are the two articles attached hereto entitled, *Soil Reconstruction: Selecting Materials for Placement in Mine Reclamation* and *Soil Reconstruction: for the best soil after mining.*

3. The soil has an A horizon underlaid by a B and/or C horizon. The A horizon is the organically enriched surface layer that has received and accumulated the residues of the native plants or the fertilizers and manures applied by the farmer. In most soils the A horizon varies from 6 to 12 inches thick. The B horizon in most soils is less favorable for plant growth than the A horizon, and usually contains more clay, gravel, calcium or sodium than the A horizons. On most soils, neither burying the A horizon under spoil during surface mining operations nor mixing the A and B horizons is compatible with full restoration of productive potentials. Generally, the A horizon of the natural soil should be segregated from the B horizon and graded back over the surface after mining. Accordingly, Section 515(b)(7) of the Surface Mining Control and Reclamation Act requires, for prime farmland areas, that the operator:

> (A) segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a

greater productive capacity; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;

4. The requirement that mined prime farmland be restored to its pre-mined capability is both practical and feasible from the perspective of a soil scientist. This is so because productivity is a function of soil characteristics, and if the A and B horizons are properly segregated and replaced on the disturbed area, the soil should have essentially the same characteristics as it previously possessed and, therefore, should have the same productive capability. Basically, it is technologically possible to restore prime farmlands to their pre-mining productivity because restoration of these lands entails replacement of the A and B horizons or materials of equal or better quality. Through proper handling, soil properties required for restoring productivity to prior levels can be recreated.

5. One of the most efficient means to comply with the Act is simply to take from the area of prime farmland to be disturbed the A and B horizons and place them on the regraded mined prime farmland. This management practice will minimize the handling of the A and B horizons because the need to stockpile the segregated soils in storage areas is eliminated.

[Dated: March 20, 1979] DONALD E. MCCORMACK

EXHIBIT C

AFFIDAVIT OF RAYMOND I. DIDERIKSEN

Raymond I. Dideriksen, being duly sworn, deposes and states:

1. I am Director, Inventory and Monitoring Division, Soil Conservation Service, United States Department of Agriculture.

2. The information set forth below is taken from official publications and statistics of the Department of Agriculture. I rely on this data. The data is also used by persons involved with agricultural products.

3. There are 2.36 billion acres of land in the United States and the Caribbean. Of this amount, 346 million acres (14.7 percent) are classified as prime farmland. However, only 231 (56 percent) of the 346 million acres are used as cropland. In Indiana, 13.3 million acres were used as cropland in 1977, and 11.5 million acres (86 percent) of the cropland is considered prime farmland.

4. In Indiana during 1977, the latest year for which statistics are available, the harvested acreage totalled 12.6 million acres for eight major field crops which include corn, wheat and soybeans, the principal row crops grown on prime farmland.

5. The following table sets forth the production and disposition of corn for grain produced in Indiana during the period 1975-1977.

Crop year	Production for grain	Used on farms where grown	Sold	Season Average Price	Value of	
					Production for grain	Sales
	Thousand Bushels			Dollars	Thousand Dollars	
		Corn for Grain				
1975.....	551,740	165,522	386,218	2.48	1,368,315	957,821
1976.....	693,000	221,760	471,240	2.10	1,455,300	989,604
1977.....	633,420	183,692	449,728	2.00	1,266,840	899,456

The 1977 crop production in Indiana for corn was the third highest in the United States. Source: *Indiana: Annual Crop and Livestock Summary* (1977), 52.

The following table sets the wheat and soybean production for Indiana during 1975-1977:

Crop year	Production for grain	Used on farms where grown	Sold	Season Average Price per Bu.	Value of	
					Production for grain	Sales
	Thousand Bushels			Dollars	Thousand Dollars	
			Wheat			
1975	61,600	3,696	57,904	3.22	198,352	186,45
1976	54,000	3,348	50,652	2.93	158,220	148,41
1977	55,800	3,404	52,396	2.20	122,760	115,27
			Soybeans			
1975	121,605	1,702	119,903	4.98	605,593	597,11
1976	111,520	1,784	109,736	6.70	747,184	735,23
1977	139,320	1,672	137,648	5.50	766,260	757,06

The 1977 crop production for soybeans was fourth highest in the United States. Marketing of all crops in 1977 totalled $2.0 billion or 61 percent of the total cash receipts to Indiana farmers during 1977. Cash receipts from corn and soybeans accounted for 53 percent of cash receipts from all crops. Source: *Indiana: Annual Crop and Livestock Summary* (1977), 53.

7. During the 1976-1978 calendar years, Indiana farmers planted for principal crops an average of 12.5 million acres and harvested an average of 12.4 million acres. (Crop acreage includes corn, sorghum, oats, barley, wheat, rye, soybeans and other agricultural commodities). With respect to total acres planted and harvested, Indiana ranked 10th in the Nation. However, Indiana ranked seventh in the Nation for total prime farmland devoted to the production of crops.

8. Yields for prime farmland are typically higher than for nonprime farmlands. However, if we conservatively assume that prime farmland yields are the same as nonprime farmland than the following is an estimate of major commodity production for prime farmlands used for cropland in Indiana in 1978: corn for grain: 637,200,000 bushels of which 547,992,000 were produced on prime farmland; wheat for grain: 31,785,000 bushels of which 27,335,000 were produced on prime farmland; and soybeans: 140,420,000 bushels of which 120,761,000 were produced on prime farmland.

Agricultural Exports

9. Agricultural commodities are of increasing importance with respect to the Nation's balance of trade. During fiscal year 1978, a record $27.3 billion in United States farm products were exported. This was equal to 28 percent of the 1977 cash receipts from farm marketings. Over half of the rice, wheat, and soybean crops were exported. Thirty percent of the corn production was shipped abroad during fiscal year 1978. Generally speaking, about 31 percent of the 1977 U.S. crop production was exported. Agricultural exports are expected to total in excess of $30 billion in fiscal year 1979.

During 1977, harvested area totalled 342 million acres and the output from an estimated 107 million of those acres were exported, including 40 million acres in food grains, 26 million in feed grains, and 37 million for other commodities. Cash receipts at the farm level from exports amounted to over $96 billion during 1976.

In 1978, agricultural exports resulted in a net gain in the United States balance of payments of $14.2 billion (agricultural exports minus agricultural imports), thereby reducing the United States trade deficit from $46.8 billion to $32.6 billion.

The value of these exports to Indiana farmers for the period October 1975 through September 1977 are as follows:

	Wheat and Flour	Total Feed Grains	Soybeans
		Million dollars	
1975	$145.9	$366.4	$239.3
1976	143.2	545.5	239.0
1977	80.6	563.0	368.5

Source: *Foreign Agricultural Trade of the United States* (Feb. 1978) (reprint attached hereto).

10. Major commodities exported in 1978 included corn (30 percent), soybeans (56 percent), and wheat (61 percent) of domestic production. Assuming that a similar percentage of these grain commodities are part of the production from Indiana, the following data demonstrates the number of bushels produced in Indiana on prime farmland and exported: corn for grain: 169,398,000 bushels; wheat: 16,674,000 bushels; and soybeans: 67,626,000 bushels.

11. The acres of crops harvested and used for specific purposes during the period 1910-1977, as the attached table demonstrates, has remained relatively stable as has the cropland used for crops. Source: *Changes in Farm Production and Efficiency* (1977), 18-19.

During 1978, one farmer supported 59 persons for agricultural products, 43.5 of which resided in the United States and 15.5 of whom lived abroad.

12. In addition to the importance of Indiana's agricultural production to the Nation and the Indiana farmer, numerous industries in Indiana depend upon the farmer for a livelihood. For example, Indiana farmers spent $371.3 million for feed, $100.3 million for seed, $313.4 million for fertilizer and lime, $387.7 million for maintenance of capital items and $131.8 million for hired labor during 1975. Source: *State Farm Income Statistics* (Sept. 1978), 42.

[Dated: April 16, 1979] /s/ RAYMOND I. DIDERIKSEN

EXHIBIT F

AFFIDAVIT OF EDGAR A. IMHOFF

Edgar A. Imhoff, being duly sworn, deposes and says as follows:

(1) I am the Regional Director, Region III, Office of Surface Mining, Indianapolis, Indiana. In this capacity I have primary responsibility for enforcement of the Surface Mining Control and Reclamation Act of 1977 in a six state region which includes the states of Indiana, Illinois, Ohio, Minnesota, Michigan and Wisconsin. My responsibilities include the monitoring of State activities related to the Act.

(2) My monitoring of such activities in the State of Indiana indicates that no application for a surface mining permit has been rejected by the state regulatory authority because the applicant could not comply with prime farmland requirements of the Act.

(3) Further, the state regulatory authority has made required determinations concerning prime farmland under the Act based upon submissions of the surface mining industry.

(4) This information indicates that industry can, and, in fact, has demonstrated the technological capability to restore prime farmland as required by the Act and that the State can, and in fact, has made determinations, as to the adequacy of such demonstrations.

(5) A review of data published by the Indiana Employment Security Division suggest a consistent rise in average employment in the Indiana mining industry from 1971 through 1978.*

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* The employment data includes employees in all mining industries in Indiana, not only surface coal mining. However, permits for surface coal mining in Indiana is at an all time high; therefore it is reasonable to assume that employment in the coal industry increased.

(6) Indiana has total estimated coal reserves of 30,237,865,000 tons. It is estimated that 17,457,984,000 tons of the total estimated reserves are recoverable by present technology.

(7) Of the total recoverable reserves, 2,237,299,000 tons are recoverable by surface mining and 15,220,685,000 tons of Indiana coal are recoverable by deep mining. Consequently, only 14% of Indiana's total recoverable resources can be surface mined.

[Dated: April 16, 1979] /s/ EDGAR A. IMHOFF

EXHIBIT G

AFFIDAVIT OF ELVIN V. WICKLINE

Elvin V. Wickline, being duly sworn, deposes and states:

(1) I am the Assistant State Conservationist for Operations, Soil Conservation Service, United States Department of Agriculture for the State of Indiana. Field offices under my supervision are responsible for reviewing soil restoration plans submitted by coal operators in their permit applications to the state regulatory authorities. In particular, those offices assesses whether or not the plan of restoration is in compliance with the prime farmland provisions of the Surface Mining Control and Reclamation Act of 1977, Section 716.7(*f*)(2) and the interim regulations, 42 Fed. Reg. 62694.

(2) My office has reviewed 66 submissions from the Indiana state regulatory authority, including six submissions from AMAX Coal Company. These submissions demonstrate that the coal operators have the capability to achieve the prime farmland provisions of the Act and regulations. In most cases, the restoration plans indicate that the coal operator intends to segregate the A horizon, B horizons and C horizons, and store the topsoil separately. In some cases it has been demonstrated that mixing the B and C horizons accomplishes a better end result than separating them.

(3) In the State of Indiana the A horizon is between 7 and 14 inches deep. The B horizon is beneath the A horizon and may reach a depth of 40 inches.

[Dated: April 17, 1979] ELVIN V. WICKLINE

EXHIBIT H

AFFIDAVIT OF ALLEN O. PERRY

Allen O. Perry, being duly sworn, deposes and says as follows:

(1) I am the Assistant Regional Director for Technical Services and Research, Office of Surface Mining, Department of the Interior, Indianapolis, Indiana.

(2) I have a B.S. degree in Geology from Indiana University and an M.S. and Ph.D. in Engineering Geology from Purdue University. I am a member of the Society of Mining Engineers of the American Institute of Mining Metallurgical, and Petroleum Engineers, the Geological Society of America, and the Association of Professional Geological Scientists. I am registered as a professional geologist in the State of Delaware. In addition, I am the author of several technical publications regarding surface mining.

(3) Prior to my present position, I was an Environmental Systems Engineer at the Argonne National Laboratory, Argonne, Illinois. Argonne National Laboratory is one of seven national laboratories established for objective scientific research in the environmental, biomedical and physical sciences. The University of Chicago operates the 1700 acre research facility which has 4,400 employees, 1500 of which are professional scientists and engineers. As a research scientist at Argonne, I supervised and conducted research projects to determine the environmental effects of mining and mineral processing. This research necessitated my becoming familiar with the current state of knowledge concerning the adverse effects of surface mining, including studies concerning the effects of surface mining in Indiana.

(4) Surface mining practices have led to substantial degradation of the environment in Indiana, especially in the area of water quality where such practices have rendered the water supplies in some of the major water-

sheds essentially unsuitable for aquatic life, wildlife, drinking water and even for irrigation purposes. The adverse environmental effects of surface mining, particularly water quality, have been documented in a report done pursuant to Section 208 of the Federal Water Pollution Control Act of 1972, amended.

(5) The degree of degradation is evident from the substantial amount of abandoned mine lands in the state. A study conducted by the Soil Conservation Service, United States Department of Agriculture in 1978, identified in Indiana, some 25,900 acres of abandoned coal mine lands. These lands continue substantial degradation to the quality of the environment, prevent or damage the beneficial use of the land and water resources, and in some cases endanger the health and safety of the public. They are lands for which no coal operator is responsible.

(6) Further, many scientific studies, including some conducted by Indiana state agencies, demonstrate that surface mining has had a deleterious effect on the land and water of the State of Indiana. For example, water quality monitoring data by the Indiana State Board of Health in 1976 showed a substantial increase in the sulfate, iron, and manganese contents of the water when streams were sampled below surface mining operations as compared to samples from above. Increases in the amounts of these substances found by this state agency render the water sampled unsuitable for aquatic life, recreation, both domestic and wildlife, drinking water supplies and irrigation.

(7) A study done by the Water Resources Research Center at Indiana University, Bloomington, which considered the effects of strip mining on the Patoka River Watershed, a major watershed in the coal producing region of Indiana, found that, as a result of surface mining, the water was rendered unsuitable for domestic water supplies because of water quality.

(8) Another study done by the Research Center of another major watershed in the strip mining area, the

Busseron Creek Watershed in Sullivan County, found that the unmined portions of the watershed provide good quality water while acid water emanates from mined areas.

(9) The effects of strip mining on water resources is well stated in still another study by the Water Resources Research Center: "In the production of coal in Southwest Indiana the intermingling of water and coal has created many problems with respect to the occurrence of water, its quality and use. Most of these problems remain unsolved."

(10) Further, where, as in Indiana, there is no requirement for special handling and redistribution of topsoil, there can be severe impacts on reclamation. Lack of topsoiling inhibits revegetation which affects erosion, sedimentation and water quality and quantity.

(11) A list of the studies referred to herein attached.

[Dated: April 17, 1979] /s/ ALLEN O. PERRY

Transcript Of Hearing Held On April 18, 1979[4]

TESTIMONY OF DR. WILLIAM W. McFEE

[Tr. 50]

3 Q. Are you employed by Purdue University?

A. Yes, I am employed at Purdue University in the Agronomy Department.

4 Q. What is your position there?

A. Professor of Agronomy and Director of the Natural Resources and Environmental Science Program in the School of Agriculture.

5 Q. How long have you held that position?

[Tr. 51]

A. I have been assistant associate and full professor combined since 1965, and Director of the NERS Program since 1973, I believe.

6 Q. Would you please briefly describe your educational background?

A. My educational background involves a degree in agronomy from the University of Tennessee, and that's a Bachelor of Science Degree, and a Master's and PhD in soil science from Cornell University.

7 Q. When did you attain your PhD Degree?

A. I attained my PhD, finished the work in '65 and the degree was awarded in January, '66.

8 Q. Could you also please describe your employment history from the college level?

A. Starting from the Bachelor of Science work, after completing that I worked for the experimental station, University of Tennessee, for a period of approximately six months in tree nutrition research, and then I was employed by the U.S. Army for three years, and then while in graduate school I was on an assistantship part of the time and a fellowship part of the time, both of which involved work in soil science having to do with soil fertility, tree nutrition, and,

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[4] See note 2 *supra*.

perhaps, germane to this, I [Tr. 52] was involved in a peripheral way in some coal reclamation research. It was not the thrust of my particular thesis, but some of the other students which I helped were working on it.

9 Q. Have you had any other connection with research in coal mine reclamation?

A. Yes, I have. I'm writing a final report for a research project, which was funded through the Cooperative States Research Service. And we have another project currently going, both having to do with the ways in which overburdened materials behave and their suitability for inclusion in a reclaimed soil.

• • •

[Tr. 53]

13 Q. Have you made any investigation regarding the restoration of surface mines as a condition for row crop production under that new act?

A. As I understand the Act, it states that in order to be given a permit for mining prime farmlands, you must demonstrate that you can return it to its former productivity. And, yes, I have done a literature review looking for evidence that this has been demonstrated.

• • •

16 Q. Now, I believe you indicated that you made a search of the literature?

A. Yes, I have made a search of the literature looking [Tr. 54] to see if this has been demonstrated in the process of preparing research proposals.

17 Q. Could you describe, please, how you conducted that search and what items you have reviewed?

A. I began by looking at literature that I had in my own possession, which amounted to a few dozen articles perhaps. Then I went to published bibliographies, and I believe the last one of those was published in '76, but there were four of those, and they referenced in abstract something over a thousand articles having to do with coal mine reclamation. Since

that time, I have looked through the journals I considered most probable to publish this sort of information, such as the *Soil Science Society of America Journal* and the *Soil Conservation Journal* and *General Environment* and several others, and then I asked for a search of the CRIS System.

18 Q. Could you explain what CRIS is?

A. I'm trying to think what the acronym stands for right now, but it's essentially the Department of Agriculture's archives of ongoing research. They compile abstracts—correction—progress reports of ongoing research from the state experiment stations, 50 something of those, the U.S. Forestry **[Tr. 55]** Service experiment stations and several other federal cooperating agencies. The archives—I have forgotten the number, but several thousand reports of current research, and I asked for key words and titles having to do with the reclamation of mine land for agricultural use and received, just within the last two months, the results of that search and it gave me a hundred twenty reports, I believe it was, having to do with the fairly liberal interpretation of those having to do with reclamation of mine land for agricultural uses that are currently going on or have been recently—that the final report has not been filed on, so it would still be in the system.

19 Q. Is the CRIS System the Current Research Information System?

A. Yes, the Current Research Information System.

20 Q. Is that a computer base type system?

A. Yes, it is stored—computer base storage, as I understand it.

21 Q. Could you explain, please, what the results of the review of this literature is, as far as specific literature relating to this area of reclamation of mine lands?

[Tr. 56]

A. I found, even though this was a tremendous volume of literature having to do with the reclama-

tion of coal mine land, that very few of the published results dealt with returning it to intensive agriculture, which I would define in this case as row crop agriculture, as far as the Midwest is concerned. There were only a few articles dealing with that, and none of them demonstrated that you could return it to the former productivity that they had—I should put it this way: None of them demonstrated that they had returned it to the former productivity.

22 Q. Is there any differentiation between the levels of management involved in making that return or in the analysis of productivity?

A. Yes. The surface reclamation—or the law which we are talking about deals with returning it to a productivity under a high level of management, and a high level of management, of course, is difficult to define. But it's usually accepted as being the type of management employed by a certain percentage of the operators in that area. And if you use that criteria, none of these research studies which dealt with row crop agriculture in the Midwest were able to get the yield back up, or at least they have not **[Tr. 57]** recorded these results that I could find where the yields have been returned to the levels—

* * *

24 Q. Did you find any such reports relating to mined farmland in the Midwest where there has been a return to row crops, such as corn or soybeans, at levels comparable prior to the mining?

A. A research project currently underway in Illinois that is directed by Professor Jansen is approaching this problem. The yield results, so far, have not approached the kind of levels that you would expect on those soils in the unmined condition.

And the work of Dr. Henning in Iowa has a few soybean yields that are coming probably within 70 or 80% of the productivity potential of unmined soils.

[Tr. 58]

And the report by Mr. Grandt that was published in the *Soil Conservation Society Journal* indicates that their corn and soybean yields were coming close or reaching the kinds of yields that might be expected under a basic level or a common level of management, but were falling short of the high level of management yield.

• • •

26 Q. Have you found anything in the literature that you have searched that shows specifically or that indicates that you can return any farmland to a hundred percent of former productivity or to demonstrate how that can be done?

[Tr. 59]

A. I have not found any literature that shows that it has been demonstrated.

• • •

[Tr. 60]

31 Q. Have you found anything in the literature that you have reviewed that shows that in practice it is possible to return levels to a hundred percent productivity using high levels of management?

A. No.

• • •

[Tr. 61]

35 Q. What type of productivity differential is involved, let's say, on the average, if that is possible, between basic level of management and high level of management?

A. I could not be precise, but I would—my opinion would be that we are dealing with something like 20 to 30% in the case of corn and soybeans.

36 Q. So that if one is required to return to prior levels of productivity under high levels of management, as opposed to productivity under basic levels of management, there could be almost, in an abstract case, a 30% differential in terms of the two requirements?

A. Yes.

TESTIMONY OF ALTEN F. GRANDT

[Tr. 71]

5 Q. What is your educational background?

A. I have a Bachelor of Science Degree from the College of Agriculture, University of Illinois, and a Master of Science Degree in agronomy from the University of Illinois.

6 Q. How long have you been working in the area of reclamation, sir, with respect to surface mined coal lands?

[Tr. 72]

A. I started in 1947.

• • •

8 Q. As a part of your responsibilities as Director of Reclamation for Peabody Coal Company, is it a part of your responsibilities to keep abreast of and to have knowledge of studies and other data that may concern levels of productivity that can be achieved on reclaimed surface coal mine land?

A. It is.

9 Q. And as a part of your responsibility, sir, have you, yourself, directed or taken part in any studies or experiments concerning the subject of productivity, agriculture productivity on reclaimed surface mine land?

A. I have.

• • •

11 Q. Have you written articles that were published in journals, so to speak, concerning the subject of productivity on reclaimed surface coal mine lands, sir?

[Tr. 73]

A. I have.

12 Q. And are you aware that some of these articles that you have written have been filed with the Court and attached to affidavits filed by the defendants in this case?

A. I am.

13 Q. And are you the Al Grandt who is the author of those articles?

A. Yes, sir.

14 Q. With respect to the two articles which you wrote, and which are attached and filed with the Court, and which are identified as Reference 3 and Reference 5, is there anything within these articles and the experiments or studies on which you were writing these articles that would demonstrate that productivity on surface mined land can be achieved under equal levels of productivity as that before it was mined, in the instance of prime farmland, to the extent of high levels of management?

A. No.

• • •

[Tr. 74]

17 Q. In regard to the experiments and studies on which you were writing in Reference 3 and Reference 5, sir, could you explain to the Court what the highest level of productivities that were achieved on reclaimed surface mine land, differentiating it between basic levels of management and high levels of management?

A. In the Knox County study the yields achieved, using topsoil on graded cast overburden was approximately 120 bushels per acre, while the yields—and by the way, that was primarily Muscatine silt loam—and the yields that would be obtained under high levels of management, as reported in the old circular, Circular 1016, I believe—I can't find my immediate reference—yes, Illinois Circular 1016, the Muscatine silt loam on high basic levels of management was 135 bushels per acre.

• • •

[Tr. 76]

26 Q. And is there any of that data that would indicate—that is, from Dr. Jansen's study in Illinois, that would indicate that equal levels of productivity on

surface mined to prime farmland can be attained under high levels of management? When I say equal, equal to that as before the surface mining.

A. It has not been.

27 Q. Are you familiar with the data that has—or is incorporated within the North Dakota study, on which two articles were included in the defendants' submittals that referred to Reference 4 and 6?

A. I am familiar with these articles, yes, sir.

28 Q. And is there anything within the data published in these articles which would indicate that equal levels of productivity on farmland can be obtained in reclamation when it's considered under high levels [Tr. 77] of management?

A. Not in corn and soybeans. Those studies did not study those two crops.

29 Q. With regard to wheat, sir, is there anything that was published with respect to the Great Plains study, authored under J.F. Tars, that indicated that productivity under high levels of management could be obtained?

A. The data does not show what the yields were compared against.

30 Q. Now, with respect to productivity gained under high levels of management and productivity levels gained under basic levels of management, could you give the Court some examples of what the difference in levels of productivity under those two levels of management could be under the data published to date with respect to basic levels of management and high levels of management?

A. I have with me the new Illinois circular, "Soil Productivity in Illinois." It's a new one, 1156. So, in effect, it has updated the circular 1016 that I used earlier. This was published in '78, April of '78.

31 Q. All right.

[Tr. 78]

A. For example, under Muscatine silt loam that we were working—

32 Q. That's a soil type?

A. Muscatine silt loam is a soil type that we were working with in Illinois. The yields under basic levels of management are 104 bushels per acre. I'm talking of corn. While the yields under high levels of management are now 167. As I stated earlier, in the old circular high yield was 145 bushels per acre.

33 Q. Does that type of differential, maybe not exactly the same differential, but is that a typical example of the productivity differential that they are talking about when they differentiate between basic level of management productivity and high levels of management productivity?

A. It's very similar. I could take a soil in southern Illinois; basic level of management, 63; high level of management, 115. Again, 40-plus bushels per acre difference.

34 Q. With respect to Paragraph 7 of Exhibit A, that being Defendants' Exhibit, sir, you have had an opportunity to review that with respect to the conclusions that the author of this affidavit attributes to you?

A. Yes, sir.

[Tr. 79]

35 Q. I would like to review those. Do you have a copy of that with you?

A. Yes, sir.

36 Q. Referring specifically to Paragraph 7, where it is contended that among those researchers as you, Alten F. Grandt, Director of Reclamation, Peabody Coal Company, who is reviewing research and after conducting studies has concluded, A, corn and soybeans can unquestionably be grown on land that has been strip mined for coal, would you say that is your conclusion, based on your studies?

A. I believe that, yes, sir.

37 Q. Is that conclusion in any way to state that corn and soybeans can be grown on reclaimed land and achieve levels of productivity under high management levels?

A. No, sir.

38 Q. The conclusion B, then, attributed to you: "Mined lands can be returned to a high level of agricultural productivity." In your mind, sir, or in your use of the terms "high levels of productivity," is high level of productivity equal to productivity under high levels of management?

A. Not exactly. There is a difference.

39 Q. And in your opinion, sir, would high levels of **[Tr. 80]** productivity be equivalent to, say, levels of productivity that could be obtained under basic levels of management?

A. They're pretty good. I would say they were high in normal layman's language.

40 Q. So when we talk about under high levels of management or basic levels of management, we are really talking about a scientific term within the agricultural community?

A. Yes, sir.

41 Q. And with respect to the conclusions stated here in land can be returned to equal or higher levels of productivity after mining, sir, does that state anything with respect to whether equal levels of yield under high levels of management can be obtained?

A. No, sir, not to me.

42 Q. And it doesn't even state anything with respect to what level of management you are going to compare it to, equivalent or otherwise?

A. No, sir.

43 Q. Now, sir, you have previously testified it's your responsibility for knowledge as to studies concerning this subject matter of levels of productivity that can be obtained after surface mining. Do you know **[Tr. 81]** of any study or any data, sir, or any scientific literature that would support or at the present time there is sufficient technology about which prime farmland can be surface mined, then reclaimed and productivity levels achieved under high levels of management equal to that which was there before it was surface mined?

A. No, sir.

• • •

Cross-Examination

• • •

[Tr. 84]

70 Q. I would like to direct your attention to the so-called Knox County study.

A. Yes, sir.

71 Q. Do you have a copy?

A. Yes, sir.

72 Q. Was this a three-year field study in Knox County, Illinois?

[Tr. 85]

A. This is a report of three years. I have the fourth—1978, we also did it, so there are four years of data available.

73 Q. In your field study in Knox County, did you replace topsoil on an area that had been mined?

A. Yes, sir.

74 Q. Did you study yields on the kinds of soils that had existed on the site prior to mining?

A. Yes, sir.

75 Q. Did you compare the yields on the original soils with yields on mined areas that had been topsoiled?

A. Yes, sir.

76 Q. And the topsoiled areas would be the A horizon?

A. Yes, sir.

77 Q. Did you also compare the yields of the areas that have been topsoiled with areas in which there had been no topsoil added?

A. Yes, sir.

78 Q. Did the addition of topsoil; that is, the A horizon, to the mined area increase the corn yields over those areas in which topsoil had not been added?

A. It did.

79 Q. In fact, weren't the yields in the topsoiled areas 60% better than the area in which no topsoil had been [Tr. 86] placed?

A. Was that the calculation? I did not calculate that percentage.

80 Q. We did and came up with 60%.
A. All right, yes, sir.

81 Q. Isn't it true that the yields on the topsoiled areas exceeded the yields on the original areas in at least one of the years in the study?
A. It did.

82 Q. Was the experiment in Knox County conducted on prime farmland?
A. Yes, sir.

83 Q. In your opinion, is it technologically feasible to restore prime farmland to its prior productive capacity under good management practices?
A. Under good basic management practices, yes.

• • •

Redirect Examination

84 Q. The difference then being, sir, when you use the term "basic levels of management" versus "high levels of management," is that correct, sir?
A. That's the difference.

[Tr. 87]

85 Q. The former can be done and the latter cannot?
A. Yes, sir, correct.

TESTIMONY OF GLENN L. KAFFENBERGER

[Tr. 93]

Q. By whom are you employed?

A. Amax Coal Company.

Q. And in what position, sir?

A. I'm a Senior Environmental Engineer in the Environmental Engineering Department.

Q. What is the nature and extent of your educational background?

A. I have a BS and an MS in engineering and technology from Southern Illinois University.

Q. As a part of your responsibilities with Amax Coal Company are you generally familiar with the requirements placed upon Amax pursuant to the NPDS System under the Federal Clean Water Act and the State of [Tr. 94] Indiana through the Stream Pollution Control Board?

A. Yes.

Q. And are you generally familiar, sir, with respect to—what shall we say—water pollution control requirements that are being placed upon your company by the 1977 Surface Mining Act and the regulations?

A. Yes.

Q. And is it part of your responsibilities to direct the company's activities in this area, insofar as compliance?

A. Yes.

Q. With respect to the elements that can be found in water that have been defined as, let's say, pollutants under the NPDS System and under the Surface Mining Act and the regulations, sir, do you know what those are?

A. Yes.

Q. And what are they?

A. The chemical constituents which are defined as pollutants under the NPDS System and the USM (sic) regulations are for alkaline waters, pH total iron and total suspended solids. For acid and ferruginous drainage, pH total iron, total manganese and total suspended solids.

[Tr. 95]

11 Q. Now, with respect to these pollutants, sir, does the separate removal, segregation and replacement of the A horizon, or the topsoil, the B and C horizon have any beneficial effects, insofar as lowering levels of these pollutants?

A. No.

• • •

[Tr. 96]

16 Q. In terms of contribution to the sedimentation in the streams of Indiana, is agriculture or agricultural activities, in your opinion, one of the high contributors of sedimentation?

A. In my opinion, they are, yes.

17 Q. And in terms of agricultural activities, would row cropping actually increase sedimentation as opposed to an agricultural activity that was, say, not for row cropping, like pasturing?

A. Yes.

18 Q. In regard to the 1977 Surface Mining Act and what some have referred to as non-point source discharges, in the aspects of the Act that might relate to that and water pollution from point discharges, how is that handled operationally?

A. I'm not sure I understand the question.

19 Q. What are sediment ponds and treating ponds for?

A. Under the Surface Mining Act all drainage from what they call affected area has to be passed through a settling basin.

20 Q. Settling basin, there we go.

[Tr. 97]

A. Okay. This is essentially non-point source runoff. Under the NPDS System and the effluent guidelines promulgated under Section 301 of that Act, we are responsible for meeting an effluent limitation from a point source discharge.

21 Q. And the effluent limitations were with respect to the pollutant you have previously talked about, is that correct?

A. That's true.

22 Q. And the 1977 Act and regulations have identified the same pollutants, insofar as what you have to —or what you are limited to once you collect them in the settling ponds and treating ponds, is that correct?

A. Yes.

23 Q. In your opinion, sir, is the return to original contour requirements of the 1977 Surface Mining Act in any way related to beneficial effects upon water pollutants like you have described?

A. No.

* * *

Cross-Examination

24 Q. Mr. Kaffenberger, will you please indicate for us your college and post-college educational experience?

[Tr. 98]

A. Post?

25 Q. Your college and any educational experience thereafter.

A. Okay. I have a Bachelor Degree, as I said before.

26 Q. In what field?

A. Engineering.

27 Q. What type of engineering?

A. Mechanical engineering.

28 Q. Mechanical engineering?

A. Yes. I have a Master's Degree on what is termed transfer and rate processes.

29 Q. Could you explain that in layman's terms?

A. Transfer and rate processes is essentially chemical engineering without a lot of chemistry background.

30 Q. Do you have any further degrees?

A. I have some post-graduate work in fluid mechanics.

31 Q. Do you have any degrees in hydrology?

A. No.

TESTIMONY OF RONALD L. LEWIS

[Tr. 101]

4 Q. What is the nature of your employment with John T. Boyd Company?

A. John T. Boyd Company itself is a mining engineering consulting firm, and my present position with the company is that of vice president.

5 Q. And in your work with John T. Boyd and in your position, sir, what do you do, generally speaking?

A. John T. Boyd Company itself handles all aspects of mining engineering from co-exploration, mine planning, reserve estimations, economic analyses, coal contract [Tr. 102] reviews. My particular area of expertise within the company is primarily coal reserves, mining recoveries and appraisal of coal lands. I also get involved with numerous other types of projects, including contract review and marketing type analyses.

6 Q. What is your educational background?

A. I have a Bachelor of Science Degree in civil engineering from the University of Pittsburgh. I received that in 1971. My professional registration in mining engineering is in the States of Kentucky, Pennsylvania, Ohio and West Virginia.

7 Q. In your position, sir, do you get into analysis of long-term coal contracts for utilities?

A. Yes, as a part of our services we do offer that.

8 Q. And that service, what does it encompass, so far as analyzing long-term coal contracts for utilities?

A. Essentially what it is, we will review a specific coal company, as far as reserves they would have, their experience in mining, their overall reliability, fiscal assets, their transportation system and generally just an overview of the entire operation, and we would state an opinion if we felt that company would be qualified or not qualified to produce a reliable source of coal under the contract terms.

[Tr. 103]

9 Q. You review the economics of the contract, so to speak?

A. Yes.

• • •

[Tr. 105]

16 Q. Have you made an examination to attempt to determine, sir, the cost per million BTU of deep surface mined coal in Illinois and per million BTU of surface coal mined in the State of Indiana?

A. Yes. Using the published shipments of coal and delivered costs, I have compared the delivered cost of Illinois deep coal to plants in Indiana and also similar shipments of coal from Indiana surface mines to plants in Indiana.

• • •

[Tr. 106]

21 Q. Now, based on the assumed increased costs that you made, as demonstrated through Mr. Meschke's affidavit, sir, what is the comparative cost, delivered cost of coal per million BTU's of surface mined coal in [Tr. 107] the State of Indiana?

A. On the exhibit itself there is actually several categories of stripped coal. You take the Indiana strip coal, which is under the long-term contract, which in definition for this purpose is coal contracts which will not expire in the next two years, the adjusted price would be $1.07 per million BTU.

• • •

[Tr. 109]

35 Q. To contrast the cost per million BTU delivered of surface mined Indiana coal, how does that contrast to the delivered cost per million BTU of Illinois underground mined coal?

[Tr. 110]

A. When you look at the comparison from the very top entry, deep coal contracts, you see that the delivered cost of Illinois deep coal averaged $1 and .079 Dollars per million BTU. This is versus the ad-

justed cost of the stripped coal of $1.07. Essentially what we are saying is just taking into account the compliance cost of prime farmland, the two coal sources are approximately equal.

36 Q. Is there a manner to determine, based on generally accepted published figures that are relied on by the coal industry and even the utility industry to determine prospective or presently planned development of coal steam-fired generators that might be producing a future demand for coal, let's say, within the State of Indiana?

A. Yes, sir. The source publication is entitled "Status of Coal Supply Contracts for a New Electric Generating Unit, 1977 to 1976," and it's dated May, 1978, and it's put out by the U.S. Department of Energy.

37 Q. And based on that, can you also determine as to these proposed new sources whether or not contracts, long-term contracts have been entered into and the actual source of the long-term contracts, in terms of what state it's in, whether it's surface mined coal or [Tr. 111] underground mined coal?

A. Yes, you can get the source of the coal by states. They do not give you the breakdown, surface or deep.

• • •

[Tr. 112]

43 Q. Is there also a source to determine the presently planned deep mines in the State of Indiana and surface mines in the State of Indiana—presently planned development of surface mines and deep mines in the State of Indiana and in the State of Illinois?

A. Yes, there is an article which appeared in *Keystone News Bulletin*, January, 1979, entitled "Keystone Predicts Rapid Expansion," and in it it's a survey of operating companies and their reported plans to either expand or develop new mines between 1978 to 1987.

44 Q. How many deep mines are planned for development in Indiana, according to that publication, sir?

A. The only deep mine showing on the tabular summary for Indiana is the Spur Mine of Peabody, and it is shown because it's anticipated that the capacity will expand from 400,000 to 500,000 tons in 1978, and that is the only entry for deep mines.

• • •

[Tr. 113]

46 Q. Do the economic figures showing the lack of deep mined coal, or coal in Indiana that is actually being deep mined, as contrasted to the amount of coal that is actually being deep mined in the State of Illinois, at this time have any meaning or import as to the mineability of the Indiana underground reserves?

A. Yes. As stated in an affidavit by Mr. Kester of Amax, which I reviewed, which indicates that the overall mineability of Indiana coals are not as favorable as Illinois deep coals, which I concur with that opinion. It's also verified by the fact that looking at the tabular summary of new projected deep mine development in Indiana, virtually there is none anticipated in the next 10 years. When you look historically at the production currently and past experience in recent years, again virtually it's very limited, essentially one mine.

47 Q. In your opinion, sir, if the surface mining industry in Indiana is displaced for whatever reason, would it be reasonable, based on your knowledge of the economic conditions and the geological conditions, to assume that if mining had to go underground or by [Tr. 114] the deep mining effort, that it would first do that in Illinois rather than the State of Indiana?

A. Yes, sir, that is my opinion.

48 Q. Now, sir, based upon the assumptions that you used as gained from Mr. Meschke's affidavit, I believe being Exhibit 9, as contrasted to the present delivered cost per million BTU of surface mined coal in Indiana versus underground mined coal in Indiana (sic), do you have an opinion as to whether this cost increase or cost differential in terms of soil handling has the po-

tential to displace the surface mining industry within the State of Indiana?

A. Yes, I believe that the potential is there to have a significant portion of the Indiana production being displaced and replaced by Illinois deep coal. And I think that that is confirmed again by the new coal mine development report by the exhibit which was entered showing the review of new coal-fired units, which is showing that the future coal source for the State of Indiana is going to be primarily from other states, and, in fact, in 1981 it's estimated that 28% of the new coal required will come from Indiana and 29% from Illinois. Now, when you compare that to the current distribution of the coals, you will **[Tr. 115]** see that at present the Indiana coal industry is supplying 50 to 60% of the total coal burned by electrical utilities in the State. So that the overall impact, even on the figures put out by the Department of Energy, is certainly showing that the coal industry of Indiana is vulnerable.

* * *

[Tr. 116]

52 Q. Mr. Lewis, I believe you indicated that if mining goes underground, it would first do so in Illinois and not in Indiana?

A. Yes, sir, I think that the past experience has certainly shown that to be the case, and when you look at the planned mines scheduled for expansion or new mine development, out of the ones planned for Illinois there are 21 deep mines, 9 surface mines. When you look at the contrasting figures to Indiana, there is one deep mine, which will be expanded, and 8 surface mines, and when you look at the estimated capacity of full operation, you are looking at in excess of 55 million tons of new capacity coming from Illinois, as contrasted to 18.1 for Indiana.

53 Q. And this would effectively supplement or supplant the surface mining industry in Indiana?

A. In my opinion it certainly has the potential to do that.

TESTIMONY OF ELVIN V. WICKLINE

[Tr. 125]

3 Q. And you have signed an affidavit on behalf of the federal government in this case, have you not, sir?

A. Yes, sir.

4 Q. And in that affidavit you talk about your having reviewed—strike that.

[Tr. 126]

What is your employment sir?

A. I work for the Soil Conservation Service, U.S. Department of Agriculture.

5 Q. And in that position the applications for surface mining permits in Indiana are submitted to your offices for review, is that correct, sir?

A. They are submitted to the county field offices.

6 Q. You mention in here that six submissions have been made by Amax Coal Company, and that's in addition to 66 submissions, and I'm assuming you are talking about submissions consisting of applications for surface mining permits?

A. Well, it's a total of 66.

7 Q. Okay. You state that these submissions demonstrate that the coal operators have the capability to achieve the prime farmland provisions of the Act and regulations. In regard to the six submissions of Amax Coal Company, sir, do you know for a fact whether or not those submissions had to do with grandfathered prime farmland or prime farmland that had to comply with the separation of the A, B and C horizons?

A. I don't know exactly on that, but I would presume that they were permits under the new law. Now, I don't know the definite answer to it, but I would [Tr. 127] presume that all we are getting for review and comment are those that come under the new law.

• • •

9 Q. So you actually have no firsthand personal knowledge whether the submissions of Amax were with respect to grandfathered prime farmland or non-grandfathered?

A. I have not.

10 Q. With regard to the submissions, sir, is it fair to assume that as long as an applicant is demonstrating that he will separately remove, segregate and replace the A horizon, B horizon, C horizon, that that means to you that he has sufficient capability or technology to achieve the prime farmland provisions of the Act and regulations?

A. Based upon what he submits in his plan, we make a judgment decision there. In most cases I don't think we have turned down anything that the operator says he can do. We do not question if he has got reasonable [Tr. 128] machinery to do the work with.

11 Q. So long as the operator says he is going to use reasonable machinery and is going to segregate the C horizon and B horizon, you have required nothing more?

A. Basically there are certain other things we do. There is an eight-point checklist that we have and we ask our people to address themselves to when they are reviewing a permit.

• • •

15 Q. I see. I'll hand you what has been marked as Exhibit 40 and ask you if that sets forth the eight points you just talked about, which if they were affirmatively shown in the permit, you would then find that the operator could comply with the prime [Tr. 129] farmland regulations?

A. In our opinion, as an agency, yes.

16 Q. I see. Do you have any knowledge as to the basis on which that determination was made?

A. These eight points?

17 Q. Yes.

A. They were developed by a special team of our staff using the rules and regulations and guidelines from our Lincoln office.

18 Q. Do you have any personal knowledge, sir, whether there are any scientific studies that have demonstrated that prime farmland can be surface mined and reclaimed to the extent of achieving equal levels of productivity under high levels of management?

A. No, sir, I do not.

TESTIMONY OF DONALD E. McCORMACK

[Tr. 136]

1 Q. Mr. McCormack, what is your present position?

[Tr. 137]

A. Director of Soil Survey Interpretations Division in the Washington office of the Soil Conservation Service.

2 Q. How long have you been in that position?

A. About two years and a half.

3 Q. What are your responsibilities?

A. I furnish national leadership to a program of the use of soil surveys in determining the use and management of land, to interpret the properties of soils in terms of those kinds of considerations about the use and management of land, so that that soil will achieve stated objectives.

• • •

[Tr. 138]

7 Q. What is your educational background, Mr. McCormack, beginning with college?

A. I got a Bachelor of Science from the University of [Tr. 139] Illinois in agricultural science, majoring in soils, in 1953. In 1960 a Master of Science in soil science, and then in 1973 a PhD at Ohio State University in soil science.

8 Q. Are you a member of any professional societies?

A. Yes, sir. I'm a member of the Soil Conservation Society of America, the American Society of Agronomy, the Soil Science Society of America, and the International Society of Soil Science.

9 Q. Have you authored or co-authored any articles dealing with soils?

A. Yes, sir.

10 Q. Approximately how many?

A. About 20 to 25.

11 Q. Have you also read literature in the field of soil reconstruction?

A. Yes, sir.

12 Q. Have you had any occasion to examine surface coal mining operations?

A. Yes, on many occasions, and over a period of —well, as I mentioned to you, 1953 was the first occasion, but then particularly in Ohio, in the responsibility I had in the soil survey there, I was a member of the Board of Review in Ohio for surface mining and **[Tr. 140]** accompanied a team of people in the mid-1960s who visited mining operations in the field in Ohio and considered the extent to which reclamation of those areas met the requirements of the law and met objectives that had been set by the State of Ohio. During the same time I was a member of the Soil Conservation Society of America's committee on surface mine reclamation, and in connection with that committee activity was on field trips that included a trip to Indiana and a trip to Illinois in the mid-1960s.

• • •

[Tr. 141]

18 Q. After a soil survey has been conducted, is it appropriate to say that the soil can be divided into three horizons?

A. In general that is true, yes.

19 Q. What are those three horizons?

A. The A, B and C horizons.

[Tr. 142]

20 Q. Please describe the characteristics of the A horizon.

A. The A horizon is the surface horizon. It's the horizon that accumulates the organic residues from the native plants that grow on the soil, and, therefore, it's higher in organic matter than the other soil layers. As a result of the higher organic matter it commonly has a higher capacity to store water. The water capacity is higher than other soil horizons, and also it has favorable structure that results from the organic matter, and that favorable structure results

in better workability. It's easier to prepare a good seed bed on the A horizon than on others.

21 Q. How would you describe the B horizon?

A. The B horizon commonly fits between the A and C horizon, and is a horizon of accumulation of clay, in some cases of nitrates or of sodium and other chemicals, but it is basically a horizon of accumulation that has lower organic matter content than the A horizon.

22 Q. And in your opinion, it is technologically feasible to restore prime farmland to its prime productive capability under good management practices?

A. Yes, sir, it definitely is.

• • •

Cross-Examination

[Tr. 143]

29 Q. Could you contrast for me, if you would, please, Mr. McCormack, a basic level of management, as used within the field of agronomy, a good level of management and a high level of management? I noticed the **[Tr. 144]** question was asked to you based upon a good level of management.

A. That's correct.

30 Q. And I have heard high level of management and I have heard a basic level of management, and if you could explain the three.

A. Let me say first that the application of these kind of terms has been very provincial in the United States. And in the Soil Conservation Service we have established definitions of average and high levels of management which are used in soil survey interpretation sheets that are in computer storage at Ames, Iowa. I have learned there is a term of basic management level that has been used in the Illinois bulletin that has previously been referred to, and I can't describe for you exactly what that definition of basic level of management is in that bulletin.

31 Q. Well, if I understand, you are not sure what basic means, is that right, as compared to average?

A. The term "basic management level" is not a term that has been defined nationally for national application, and to the best of my knowledge, the term has been used in Illinois. Now, I'm frankly not familiar with the use of that term and the specific definition for [Tr. 145] that term outside of the State of Illinois.

32 Q. Would average levels of management give rise to—well, let me ask you this: In this computer thing you have over in—wherever it is—

A. Iowa State University.

33 Q. They use the term average level of management?

A. That's correct.

34 Q. And high level of management?

A. That's correct.

35 Q. And the question was asked of you, based upon a good level of management. Does that computer use the term "good level of management"?

A. No, sir, it does not.

36 Q. It does not. So that your answer to that question doesn't really have any relevancy to the issue of having to achieve equal levels of productivity under high levels of management?

A. My assumption in responding to the question about good level of management is that, in effect, that would be what an agriculturalist with a general background of crop production would consider to be an appropriate level of management for good yields. Now, this—

37 Q. Excuse me. How does that contrast with this industry [Tr. 146] term called "high level of management"?

A. Beg pardon? The industry?

38 Q. Yes. The Department uses "high level of management," okay?

A. That term.

39 Q. As a term of art, almost, if you will. They put it under high levels of management in your computer and you have productivity. I want to know what good levels of management are in contrast to high levels of management. Is one higher or lower?

A. I think your question probably pertains directly to the reasons for the testimony that I gave, the response that I gave to the question. Can I assume that that is true?

40 Q. I would rather that you answer my question, if you would, please, as opposed to conjecturing on why I'm asking the question.

I guess I don't understand what you mean by good level of management and I don't understand what the Act talks about when it talks about a high level of management and what the regulations talk about when they talk about a high level of management.

A. The high level of management in the Act, to the best of my knowledge, refers to the high level of [Tr. 147] management as defined by the Soil Conservation Service and use in the soil conservation interpretations that appear at Ames, Iowa on the soil survey interpretation sheets.

41 Q. How does that good level of management compare to that, then, sir? Good level as opposed to high level?

A. Well, I frankly think that good level of management has a wide range in kinds of interpretations, depending on who you talk to. That is the reason I gave the answer that I did before relative to the general agricultural application of good management practices.

42 Q. The Act does not use the words "good level of management"?

A. That's correct.

43 Q. Right?

A. That's correct.

44 Q. So his question, then, is not—the question you answered is not the standard of the Act, is that correct, sir?

A. My interpretation and my answer was that it was.

45 Q. Good is equal to high?

A. Yes.

46 Q. Do you know of any studies, sir, that have established—scientific studies by agricultural schools, or

[Tr. 148] by anybody qualified in the industry, that has demonstrated that surface mined land, prime farmland, can be reclaimed and equal levels of productivity gained under high levels of management?

A. As you know, the intent of the Act—

• • •

A. (Continuing)—is to restore the productivity of the land.

47 Q. Could I have a yes or no answer first and then you could explain your answer.

A. I prefer to do it the other way, sir.

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[Tr. 149]

THE COURT: I think you can answer that as to whether you are aware of any studies in that area, Mr. Witness.

THE WITNESS: Let me refer you first to a farm in Somerset County, Pennsylvania, the Calvin Wills farm, where personnel in Soil Conservation Service have informed me that the soil has been restored and that the yields that were obtained prior to mining have been achieved. This man is a good manager and he insisted when his farm was leased that the soil be restored so that he could obtain the same returns from the soil, or better returns than he obtained prior to mining.

Also in the example of the paper from Knox County, Illinois, which Mr. Grandt testified about, the yield on the Muscatine soil was 7900 kilograms per hectare. I believe that yield is over 140 bushels per acre. We might ask Mr. Grandt, but I presume [Tr. 150] that conversion is about right.

MR. GRANDT: One hundred thirty-five.

THE WITNESS: This represents quite a high production from that area. And the yield where the topsoil was returned is essentially the same as the original Muscatine soil in each—the average for the years. In fact, in one of the three years we know that actu-

ally higher yields were obtained where the topsoil was replaced than on the original Muscatine soil. I think that that is a good indication.

Now, in that case also it's true that the B horizon, as Mr. Grandt pointed out, was not restored according to the requirements of the law. It was just placed on the graded cast overburden, as I recall, in the B horizon. But, however, 12 to 15 inches, according to his testimony, of A horizon was restored to the land, and I think with a yield level as high as was obtained there is an indication that high productivity can be restored after mining on prime farmland.

The work I cite is the third example of work in North Dakota, which, in effect, I think demonstrates that on that land, on the wheat land, the [Tr. 151] essential productivity of good wheat land was restored following mining. And I bring this up because of the idea that the intent of the law was to restore—

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48 Q. In the example in Pennsylvania, sir, that you were talking about that you know of, when was that reclamation—or when was the mining on that done?

A. The mining is proceeding progressively. It's a fairly small operation and less than five acres are mined each year, but the restoration is proceeding currently.

49 Q. How long has that been going on?

A. At least five years.

50 Q. What type of crops were grown on this land before mining?

A. It's a livestock and dairy farm, and corn, wheat and clover are the principal crops there.

51 Q. Corn, wheat and clover?

A. Clover hay, yes,

52 Q. What amount of the corn and wheat was marketed for [Tr. 152] non-farm use, do you know?

A. No, sir, I don't have any idea. It's a dairy farm and I think he feeds most of it.

53 Q. So he feeds most of it, I see. Do you have any data available that would tell us what the yields were on that farm prior to the surface mining?

A. No, sir, I don't have that data.

54 Q. Is it available someplace?

A. The local Soil Conservation Service, district conservationist and soil scientist are familiar with the data.

55 Q. I see. But you, sitting here today, have no knowledge of that data?

A. That's correct.

56 Q. Sitting here today, sir, do you have any knowledge of what the data was on the farm after it was mined and reclaimed?

A. No, the report that I have is that the yields are as high or higher within two years after mining on that farm than they were prior to mining.

57 Q. And what report is that, sir?

A. The discussion with the Soil Conservation Service personnel in Pennsylvania.

58 Q. That's what they have told you?

[Tr. 153]

A. That's correct.

59 Q. There has been no published data on this?

A. I believe there has been some publication from this, but I can't tell you where it is.

60 Q. Certainly if you had found it you would have had it in the affidavit?

A. I didn't find it. I didn't look for it, frankly.

61 Q. Now, you stated that the study in Illinois is an indication of capabilities to achieve higher productivity and to return land to essential productivity. Now, so we can get our synonyms straight again, is that synonymous, as in the instance of good levels of management and high levels of management, this high productivity, is that high productivity under high levels of management, average levels of management or good levels of management, as you used the term?

A. I don't recall any reference to "essential," as you are pointing out in the question.

62 Q. Let's use high productivity, sir.

A. I was referring to the general concept that a high level of productivity had been restored after mining, and I think in general a soil scientist and an agronomist and agriculturalist would agree that 135 [Tr. 154] bushels of corn would be high productivity.

63 Q. I guess my question is—

A. The level of management under which that yield was obtained is not described specifically enough in the paper that I referred to by Mr. Grandt for me to say whether it was achieved under high management or not.

64 Q. Okay. The Act, insofar as the target is concerned in the application and the regs, in that regard, require high levels of management, do they not?

A. The reference to high levels of management, yes.

65 Q. And if there was a high level of management on the land before mining and the productivity after mining, one is going to have to demonstrate the technology and capability to achieve the productivity after mining under high levels of management equal to that previous to mining, isn't that correct, sir?

A. In this situation the fact that the original Muscatine soil produced essentially the same yield as the mined soil with topsoil returned and that both of those yields were high, I think is very, very significant. Now, these would be considered high yields by agriculturalists, and specifically I don't know exactly what the yield level of Muscatine would [Tr. 155] be under high level management, but a hundred and thirty-five bushel would approach that.

66 Q. So I guess the high level of productivity is really what you think has been shown? Technology is capable of going to a high level of productivity?

A. I think the technology has been proven that soil properties can be created so that the productivity of land after mining will be restored. I think that was the intent of the law, and I think that has been shown.

67 Q. I see. Without regard to high levels of management?

A. The productivity of the land after mining can be restored because the soil properties required for that productivity can be re-created.

68 Q. Without regard to high levels of management?

A. The productive capacity would be in reference to any level of management; high, medium or whatever. If you put a hundred pounds of nitrogen on the soil that existed prior to mining, you could expect a given kind of result on that soil prior to mining. And if you mined and restored the soil the way that you should, put a hundred pounds of nitrogen on it, you can predict what the response would be because you knew what it would be on the unmined soil. You get **[Tr. 156]** essentially the same properties that create production by careful restoration of the soil properties.

69 Q. And the study that supports that is this experience out in Pennsylvania, which is not Indiana, I take it, and you think you can extrapolate or interpret the study that Mr. Grandt did to say that also?

A. Yes.

70 Q. Those are the two bases on which you are giving this opinion?

A. Well, plus a knowledge of the kind of soil properties that are required to make a productive soil.

71 Q. I see.

A. Which this is no mystery to soil scientists and agronomists.

72 Q. Other than the fact it's never been done except in the instances that you are citing?

A. The soil properties can be created to produce a productive soil, in my opinion.

73 Q. That's your professional opinion?

A. That's correct.

74 Q. And I assume, then, based on your opinion, sir, as long as in a mining application permit one sets forth that they were going to use the proper type of machinery and as long as they were going to segre-

gate [Tr. 157] the A horizon, separately remove the B horizon, the C horizon, that would be a sufficient showing?

A. No, sir.

75 Q. What else would you have to show?

A. Well, one thing, I think you would have to show that the soil properties that would be required for productive soil were re-created after mining. I think the soil handling has been pointed out before in previous testimony. The soil handling by an end loader with a bulldozer or in thick layers to assure the result would be an important consideration, and if there wasn't special provisions for handling the soil, then I think that might be grounds to challenge the capability.

76 Q. What type of special provisions for the handling of this soil do you think should be shown that would show capability of returning the land to prior levels of productivity under the equal levels of management?

A. I think one aspect of special handling would be just simply the plan that would result in the identification of the number of inches of A horizon that would be placed back on the land, how the A horizon would be handled; would it be stockpiled, would it be handled in one operation. Another aspect would be [Tr. 158] that the number of inches of B horizon would be identified and that it would be restored to the site, or if it's to be a mixture of B and C horizon the proper portion of each component that would be placed, how that material would be mixed, how it would be stockpiled, if stockpiling was necessary, how it would be re-graded on the surface, including the kinds of machinery to be used would be important in soil handling consideration.

* * *

[Tr. 159]

80 Q. But assuming, then, the right methodology of taking it off and stockpiling it and using the right type of equipment to replace it, as long as you separately remove and replace the A horizon, B horizon and C horizon, it is your professional opinion that equal levels of productivity under the same levels of management would be achieved on that land after reclamation?

A. Those would be the most important considerations, yes, sir.

• • •

81 Q. Mr. McCormick (sic), in regard to the Wills farm in Pennsylvania, when did you have this discussion with your staff members regarding the yields?

A. 1976.

82 Q. 1976?

A. In fact, it was in preparation for the paper that was published in the *American Mining Journal.*

83 Q. Did you ever have yield figures?

A. No, sir, I don't think specific yield figures were [Tr. 160] referred to.

Respectfully submitted,

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. McCORD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THEODORE L. SENDAK
Attorney General
State of Indiana
JACK R. O'NEILL
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6357

For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR.
BYRON L. MYERS
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213

For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

No. 80-231

Supreme Court, U.S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Appellants,

v.

STATE OF INDIANA, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Indiana

MOTION TO AFFIRM

THEODORE L. SENDAK
Attorney General, State of Indiana
JACK R. O'NEILL
Deputy Attorney General, State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6357

For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR.
BYRON L. MYERS
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
(317) 635-1213

For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Appellants,

v.

STATE OF INDIANA, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Indiana

MOTION TO AFFIRM

Appellees, pursuant to Rule 16, move the Court to affirm the judgment of the United States District Court for the Southern District of Indiana.

REASONS FOR AFFIRMANCE

Introduction

Any analysis of the constitutional questions presented must begin with an in-depth understanding of the complicated provisions of Title V, § 501 *et seq.*, of the Surface Mining Control and Reclamation Act of 1977 [30

U.S.C. § 1251 *et seq.* (Supp. 1979)], which subtly, but quite directly, operate upon the States by dictating land use policies as well as governmental structures, procedures and criteria for making decisions on land use policies, all on pain of Federal usurpation. The Secretary continues before this Court, as the Secretary did before the District Court [relying mainly on the title of the Act and ignoring the challenged provisions] to mischaracterize the challenged provisions of Title V as, (1) being related solely to pollution control, with only incidental land use control and planning requirements, and (2) not being directed at the States, but solely at private mining operations.

Before addressing the questions presented, appellees will first demonstrate that provisions of the Act, which the District Court found to be contrary to the Tenth and Fifth Amendments as well as beyond the Commerce Clause power, operate on the States, and then demonstrate that the prime farmland and other provisions of the Act are related solely to land use control and planning, as opposed to interstate spill-over effects of water and air pollution.

Operation Of The Act On The States

Under the permanent phase of the regulatory scheme established by the Act, in order to retain jurisdiction over the regulation of surface coal mining and reclamation operations as well as the land use planning and control functions encompassed by the Act, each State must submit a State Program, including "a State law . . . in accordance with the requirements of this Act" and "regulations consistent with regulations issued by the Secretary pursuant to this Act," § 503(a)(1) and (7), or else those functions will be usurped by a Federal Program administered by the Federal Government,

§ 504(a). That is, unless a State submits a State Program by passing laws and promulgating regulations conforming to both the Act and the Secretary's regulations, the Federal Government will promulgate and administer a Federal Program for the State. Thus, on threat of Federal usurpation, in order to retain their sovereign land use planning and control functions, the States have no choice[1] but to exercise their legislative and executive powers by enacting laws and promulgating regulations containing land use policies as well as providing governmental structures, procedures and criteria for further land use decisions that are a mirror-image of those dictated by the Act.

Land Use Planning And Control Provisions

As found by the District Court, the "prime farmland provisions"[2] of the Act are totally unrelated to water pollution control[3] and are singularly and solely land use control and planning devices. These provisions require that: (1) prime farmland be defined as set forth in regulations of the Secretary of Agriculture, § 701(20), without regard to what is actually prime farmland within a State based on State determined land use policies; (2) mined prime farmland be returned to farming use after mining as a condition to allowing surface

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[1] As the Secretary notes, Jurisdictional Statement at 3 [hereinafter cited as "JS"], Indiana has submitted a State Program; however, as found by the General Assembly, the State of Indiana was "coerced" into enacting enabling legislation so that an Indiana program would comport to the Surface Mining Act only to avoid the "Federal encroachment." IND. CODE § 13-4.1-1-1(2) and (4) (Supp. 1980); Conclusion No. 1, JS App., at 27a.

[2] The "prime farmland provisions" are set forth at JS App., at 8a-10a, and are hereafter referred to collectively as such.

[3] The prime farmland provisions actually *increase* water pollution. Finding No. 8, JS App., at 16a.

mining on prime farmland, and (3) the postmining land use be farming for up to ten years.[4] These land use control policies will be effectuated in Indiana through a State Program meeting Federal requirements, or directly usurped through a Federal Program formulated and administered by the Federal Government.

Further land use policy concepts contained in the "approximate original contour," § 515(b)(3), "topsoiling," § 515(b)(5),[5] and prime farmland provisions are demon-

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[4] This farming use is required by the express language of the prime farmland provisions. *See In Re Permanent Surface Mining Regulation Litigation*, No. 79-1144, slip op. at 5, (D.D.C., May 16, 1980):

> Illinois attacks the Secretary's regulation that requires an operator to designate cropland as the post-mining land use for prime farmland. 30 C.F.R. § 785.17(d)(1). . . . Illinois believes that Section 515(b)(2) of the Act . . . affords the operator an open ended choice as to the post-mining land use.
>
> Illinois mistakenly reads Section 515(b)(2) in isolation. . . . But the Act prescribes additional and specific requirements for prime farmland. For example, the SMCRA prohibits release of bond "until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area . . ." Section 519(c)(2) of the Act. . . . This equivalency standard could not be achieved absent the post-mining employment of prime farmland as cropland.
>
> Section 510(d)(1) . . . corroborates the imposition of an additional requirement for mining on prime farmland: the land must be reclaimed and used as crop land.

The required farming use results, in part, because it will take up to ten years of continuous farming to make the demonstrations required for the release of the bond pursuant to § 519(c). The Secretary admitted this fact in his comments to the proposed regulations, 30 C.F.R. § 823.15. See comments set forth in Conclusion No. 5, JS App., at 30a.

[5] Section 515(b)(3) [hereinafter "original contour provision"] requires that mined land be returned to its approximate original contour after mining. Section 515(b)(5) [hereinafter "topsoiling provision"] provides that the topsoil of mined land must be removed, stored and replaced in a separate layer.

strated by the absence of variances from these requirements as applicable to Indiana. For example, where mining occurs on "mountaintops" or "steep slopes" which are not present in Indiana, the Act provides for variances from the original contour requirement if other than the original contour is compatible with a proposed postmining land use which is deemed by the regulatory authority to be an "equal or better economic or public use of the affected land, as compared with premining use," §§ 515(c)(3)(A), (e)(3)(A). The Act allows no meaningful variances from the original contour, topsoiling, and prime farmland provisions for lands in the Midwest, even where these requirements are unnecessary to the attainment of a particular postmining land use, as residential, industrial or recreational uses. In other words, variances are allowed only where the Federal Government has predetermined that there can be an "equal or better economic or public use" of the local land. Variances are not allowed in the Midwest because the Federal Government has predetermined that there is no higher and better use of the land following mining, and in the case of prime farmland, that the highest and best use is farming.

That the absence of variances from the original contour, topsoiling and prime farmland provisions as applicable to Indiana is based on land use policy decisions, not pollution control, is demonstrated in the history of the Act. It was expressly noted that surface mining presents an opportune time for land use planning by reshaping the land,[6] but that variances from the prescribed standards were only permitted where the Federal Government predetermined that higher postmining land uses would result.

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[6] See Conclusion No. 13, JS App., at 34a.

A uniform variance based on land uses was provided from the original contour requirements for all lands, not just steep slopes or mountaintops, at the time the Act was originally passed by the Senate. See § 415(d), 123 CONG. REC. S8,182; 123 CONG. REC. S8,170, (May 20, 1977). Such variances were deemed required based on land use planning considerations:

> [T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably—without rigid contour requirements—there is no reason why further beneficial land uses cannot be carried out on reclaimed land. . . .
>
> . . . .
>
> It must be borne in mind that protection of environmental values does not in every instance require return to an original contour. 123 CONG. REC. S8,101 (daily ed. May 20, 1977) (remarks of Sen. Byrd).

However, in the Committee of Conference, without any rational basis, the uniform land use variance from the "rigid" contour provisions, based on land uses, was restricted to only steep slopes and mountaintops, §§ 515(c)(3)(A), (e)(3)(A), which are not found in the Midwest. Again, the predetermined Federal land use policy is that in the Midwest, land uses which could result from such variances are deemed not to be equal or better land uses.

These predetermined Federal land use policies effectuated through the absence of variance provisions are most blatant in the case of the prime farmland provisions. Several Senators remarked at the time of their introduction that the mere requirement that land be restored to equal or higher and better use [§ 515(b)(2)] was not considered sufficient for prime farmland, and that in addition a postmining farming use was required:

> [T]hat caveat of a higher or better use [in § 515(b)(2)] is the hooker. This is the loophole you can drive a truck through. I shall tell you why.
>
> The effect of this amendment [prime farmland provisions] is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. We are giving all that discretionary authority to some bureaucrat.
>
> I do not want to do that. 123 CONG. REC. S8,111 (daily ed. May 20, 1977) (statements of Sen. Culver).

Hence, the absence of variances from the original contour, topsoiling and prime farmland provisions as applicable to the Midwest, particularly Indiana, shows that the Federal Government predetermined that there can be no higher and better land use, regardless of what may be the local land use planning and control policies or needs. The Federal land use control and planning policies will be effectuated in Indiana, again, either by a State Program that conforms to Federal dictates, or by the Federal Government pursuant to a Federal Program for Indiana.

Another blatant example of Federal land use control is found in § 522 of the Act, which dictates that the States adopt specific governmental structures, procedures and criteria for making land use planning and control decisions, on pain of Federal usurpation, in which case the Federal Government will make those policy decisions. This section requires that a specific procedure be established to designate land unsuitable for surface coal mining and delineates the relevant criteria which are totally unrelated to air and water quality, as whether mining is incompatible with "local land use

plans or programs" or affects "fragile or historic lands" where significant damage could result to "important historic, cultural, scientific, and esthetic values . . . ." See § 522(a)(3). A permit will not be issued to mine on land that has been designated unsuitable for surface mining, § 510(b)(4). Again, this land use policy procedure and governmental structure will have to be adopted by a State in its program, or it will be usurped in a Federal Program with the decisions actually being made by the Federal Government. In addition, § 522(e)(4) and (5) create buffer zones prohibiting "surface coal mining operations," see § 701(28), which would encompass such activities as parking vehicles used in the mining operation. As to road relocation and closings, Indiana is mandated to change its governmental structures by which such decisions are presently made by County Commissioners and the Indiana State Highway Commission,[7] or to relinquish its right to make these decisions to the Federal Government.

The District Court also found unconstitutional, JS App., at 10a, 11a, 19a, those provisions of the Act which combine to require specific State governmental structures and standards for approving proposed postmining land uses, irrespective of existing state governmental structures and standards. Through the permitting procedures and reclamation plan requirements of the Act, §§ 506-508, a mine operator must obtain approval to change the postmining use of the land from that which existed before mining, §§ 508(a)(3), (4), 515(b)(19), (20) and 510(b)(1), (2). These provisions resulted in regulations requiring the approval of changes of postmining land use, defining precisely what is deemed to be a change in land use, and establishing ten land

[7] See Conclusion No. 14, JS App., at 34a.

use categories, ranging from "cropland" to "undeveloped land," 30 C.F.R. § 701.5, which read like zoning ordinances. The premining land uses must be determined in accordance with whether the land was properly managed and, further, if the premining use of the land was changed within five (5) years, then the postmining land uses must be compared with the historic use of the land. 30 C.F.R. § 816.133(b). Not only are specific governmental structures and procedures mandated, but specific criteria are established and required by which the approval of the proposed change in postmining land use will be determined. Again, the provisions directly require that the State adopt federally dictated governmental structures and procedures, as well as direct land use planning and control criteria and policies, or those functions will be usurped and performed by the Federal Government pursuant to a Federal Program.

Finally, the prime farmland, topsoiling and original contour provisions, which have no meaningful variances applicable to Indiana, are a part of the federally dictated land use policy of making surface mining an unpreferred land use to underground coal mining and farming, regardless of a State's land use policies and needs.[8]

As the District Court found,[9] all the above provisions are unrelated to the control of air or water pollution, which further supports the conclusion that the land use control and planning dictates of these provisions are not merely "incidental," as the Secretary contends. This conclusion is compelled when it is considered that the Act,

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[8] This policy is expressly set forth in § 101(b) and § 102(c) and (k), as well as other provisions. See Conclusion No. 17, JS App., at 35a.

[9] Findings No. 7, 8, 9, Conclusion No. 2, JS App., at 16a-18a.

in ten separate provisions,[10] contains requirements clearly directed at water pollution control.

1. Ruling On Tenth Amendment Issues Was Correct

The Secretary contends, without focusing on the specific provisions of the Act found unconstitutional by the District Court, that its analysis was erroneous under the Tenth Amendment and *National League of Cities v. Usery*, 426 U.S. 833 (1976), because any land use consequences of the provisions are merely incidental, the regulation of surface coal mining is not an integral governmental function protected by the Tenth Amendment, and the States are not compelled, but only encouraged, to enforce the Act.

The District Court correctly perceived that the specific provisions of the Act addressed were not merely incidentally concerned with land use control and planning, but rather had as their single and sole purpose Federal land use control and planning. [See pp. 3-10 *supra*.] The District Court did not hold that the regu-

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[10] Those provisions are §§ 515(b)(4), (8), (10), (11), (14), (16) and (19). On the basis of these provisions, the regulations promulgated by the Secretary require the use of sediment and treatment ponds to control the four identified water pollutants—iron, manganese, suspended solids and acidity (pH), which are not controlled by any of the provisions challenged by the appellees, and that surface drainage from non-point sources be controlled. All of the foregoing requirements are in addition to or maybe even duplicative of the control of point sources under the national pollutant discharge elimination standards of the Clean Water Act, as amended, 33 U.S.C. § 1251 *et seq.* and particularly § 1362(14). Finding No. 7, JS App., at 16a. See *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), *cert. granted sub nom. EPA v. National Crushed Stone Association*, ... U.S. ....., 62 L.Ed.2d 750 (1980).

lation of surface coal mining was an integral governmental function protected by the Tenth Amendment. Rather, the District Court reasoned that, "Land use control and planning is a traditional or integral governmental function or area of State sovereignty,"[11] essential to the separate and independent existence of the States.

Land Use Planning And Control—An Attribute Of State Sovereignty

As to the Commerce Clause, *National League of Cities* held that Congress may not exercise this "authority in [a] manner" so as to impair "attributes of [State] sovereignty," particularly governmental functions "essential to separate and independent existence" of the States. 426 U.S. at 845. Land use planning and control is such an attribute of State sovereignty.

National League of Cities is but a part of the evolution of "limits imposed by federalism," which evolution must take place "just as our understanding of Congress' power under the Commerce Clause has evolved."[12] Anything short of such balanced evolution will eventually leave but a national constitution, as opposed to a "compoundly federal and national constitution" as intended and actually structured by the Framers.[13]

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[11] Conclusion No. 3, JS App., at 28a.

[12] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). It may be that "experience" and not "logic" or even political philosophy is at the base of the evolution of federalism principles. *California v. United States*, 438 U.S. 645, 648 (1978).

[13] Diamond, *Commentaries on The Federalist*, 86 YALE L.J. 1273, 1282-83 (1977).

If the Commerce Clause extends to local activities which affect commerce "even in the minutest degree,"[14] then Congress quite obviously can extend its powers into areas "never intended" or contemplated by the Framers of the Constitution[15] and the implicit federalism concepts. The concomitant necessity for the evolution of the limits imposed by federalism, particularly on the Commerce Clause power as it affects the attributes of sovereignty of the States, is self-evident.

As but one example—if the postmining land use of prime farmland can be restricted by Congress to farming, which effectively prohibits any other use, including non-commercial uses [based on a negligible effect on interstate commerce], the Commerce Clause will be extended to reach local non-commercial activity, both public and private. Based on the asserted yearly change in use of one million acres of land from agricultural productivity, of which 98% is due to urbanization and water needs and only 2% is due to surface coal mining [the yearly wasted agricultural productivity through the Agricultural Stabilization Program is *200 times more than* the amount affected by surface mining],[16] the Federal Government seeks to mandate land use planning and control on prime farmland. Assuming this to be a substantial adverse effect on interstate commerce so as to support the purported exercise of the Commerce Clause power, then the Federal

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[14] *Maryland v. Wirtz*, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting), *reversed, National League of Cities v. Usery*, 426 U.S. 833 (1976).

[15] *Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting). *See also* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977).

[16] See discussion, pp. 20-24 *infra*. Findings No. 1-6, JS App., at 12a-16a.

Government can exercise land use controls over any change in use of farmland.

This result would propel the Federal Government, even more than in the case at bar, into the heart of urban and water resource land use planning and control—directly into non-commercial State and private activity. This is not, as the Secretary asserts, JS at 17-18, No. 79-1538, an area of private commercial activities differentiated in *National League of Cities*, 426 U.S. at 845, and subject to the dual sovereignty of the States and the Federal Government over which the latter may preempt State law determinations.

As recognized in *National League of Cities*, a "State" is more than merely the location of its capital, but also includes integral governmental functions as fire protection, police protection, sanitation, public health, parks and recreation, as well as hospitals and schools. Land use planning and control is a hybrid of such integral governmental functions and a State's regulation of purely local non-commercial activities on its lands. Even those who would take *National League of Cities* into areas far removed from this Court's analysis acknowledge the special place of land use planning and control to States' separate and independent existence.[17] The essence and experience of land use planning and control transcends its being characterized solely in terms of a power source. It is not merely an exercise of

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[17] Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1232, 1266 n.235 (1977). Most authorities would agree that "Congress cannot deny the States some symbolic corollaries of independent status, some revenue with which to operate, *some sphere of autonomous law making competence* and *some measure of choice in selecting a political structure*." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978) (emphasis added).

the police power reserved to the States by the Tenth Amendment[18] which is also subject to preemption by an exercise of the Commerce Clause power, just as the provision of police and fire protection transcends merely being an exercise of the police power, rising to the level of attributes of State sovereignty.

Land use planning and control is essential to the separate and independent existence of States and their local communities for it is by this means that communities effectuate the nature of their existence. Land use planning and control defines the nature of the existence of a community including its character, environment, and the quality of life by determining whether it will grow or limit its expansion,[19] whether it will encourage industrial development,[20] whether it will seek to preserve historical and natural advantages,[21] whether it will limit population density,[22] and whether there will be agricultural development as opposed to industrial development.[23]

This essence of land use planning and control embodies elements of federalism as the local self-determination of the nature of its existence. This Court

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[18] See *United States v. Darby*, 312 U.S. 100, 124 (1941); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).

[19] *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[20] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[21] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[22] *Agins v. City of Tiburon*, ... U.S. ....., 65 L.Ed.2d 106 (1980).

[23] *Goffinet v. Christian County*, 65 Ill.2d 40, 357 N.E.2d 442 (1976).

in *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975), recognized that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities." These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[24] and derive at least in part because of the very diverse geography, geology and climate among the States and which differences "have all but necessitated the recognition of legal distinctions corresponding to these differences," including principles of federalism. *California v. United States*, 438 U.S. 645, 648 (1978). To remove these government decisions or the hybrid governmental service of land use planning and control from those affected and concerned, is to allow rule by those whose destinies, existence and, therefore, perspective are totally removed from the consequences without accountability. It would cut to the core of principles of federalism.

Land within a State's boundaries is a part of the State. The State's relationship to its lands has been accorded special treatment.[25] More important, land within a State's boundaries is subject to public or State use in

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[24] See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926), where this Court held:

> [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . . Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial developments shall cease at its boundaries, but that the course of such developments shall proceed within definitely fixed lines.

[25] See *Kansas v. Colorado*, 206 U.S. 46, 93 (1907), where it was held, "It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders."

the form of a servitude by which the State can restrict the owner's right to use the property for the benefit of the State and its citizens without a "taking" occurring, in part because of the presumed local benefit-burden resulting from land use planning and control.[26] Land use control and planning is in fact a State's use of its land based on a quasi-property interest which is a part of the "States as States." For the Federal Government to regulate this State use of land is to regulate the "States as States."

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of federalism is the protection afforded the property rights which cannot be "taken for public use, without just compensation." It is the presumed local benefit-burden resulting from land use planning and control which prevents a "taking"[27] and again emphasizes the elements of self-determination and accountability within federalism concepts. To allow the Federal Government under the Commerce Clause to dictate land use control and planning concepts would so dilute the local benefit, leaving only the burden, as to impinge directly upon Fifth Amendment rights.

This hybrid governmental service of land use planning and control through a State's use of its lands for the benefit of its citizens in today's urbanized society is one of the most essential attributes of sovereignty possessed by the State of Indiana and its political subdivisions. Indeed, in the case at bar, the Secretary has never argued to the contrary.

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[26] See *Agins v. Tiburon*, ... U.S. ....., 65 L.Ed.2d 106, 113 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 134-35 (1978).

[27] *Id.*

Encouragement Versus Coercion

Quite to the contrary of the Secretary's assertions that the Act only "encourages the States to enforce the Act," and that "there is no statutory requirement that the states enforce any particular standard," JS at 18, No. 79-1538, the Act in the various provisions challenged operates directly on the States through §§ 503 and 504 to compel the States by threatened Federal usurpation not only to enforce the Act, but to exercise their legislative and executive powers. These sections require that either a State Program contain statutes and regulations comporting fully with the Act and the Secretary's regulations, § 503(a)(1), (7), or there will be Federal usurpation through a Federal Program administered by the Federal Government, § 504(a).

As found by the District Court, regardless of whether Indiana chooses to adopt Federal land use policies as well as the dictated governmental structures, procedures and criteria for other land use policy decisions mandated by the Act, or abdicates these functions to the Federal Government, the issues are the same. Unless the Federal Government has the power to make directly these land use decisions as under the prime farmland provisions or to assume the role as decision-maker under the procedure for declaring lands unsuitable, § 522, the fact that a State "chooses" to adopt these provisions in a State Program to avoid the usurpation by the Federal Government is irrelevant.

These conclusions are compelled by *National League of Cities* and *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1936). In *National League of Cities* the Federal Government did not directly mandate or control State policies in the areas of fire protection, police protection, sanitation, parks, recreation, schools and hospitals. Yet the indirect infringement on State policy

decisions in these governmental services traditionally delivered by the States was held to be contrary to the Tenth Amendment and other federalism concepts implicit in the Constitution. Had the Federal Government directly usurped the State governmental services, or directly mandated that the States perform these governmental services pursuant to federally dictated policies, there can be no doubt that the transgression of Tenth Amendment and federalism concepts would have been even more severe. This is the "choice" in the case at bar—States can change their policies to those dictated by Congress, or the Federal Government will usurp the functions. To state that such is a "choice" is a perversion of the word.

Similarly, this Court acknowledged in *Steward Machine Company* that Federal statutes are void "as involving the coercion of States in contravention of the Tenth Amendment," if two propositions are "made out by the assailant:"

> There must be a showing in the first place that separated from the credit [as applicable to the case at bar, the required State Program] the revenue provisions [as applicable to the case at bar, a Federal Program directly usurping the State functions] are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the States. 301 U.S. at 586.

In other words, if the provisions of the Act which dictate State land use planning and control decisions as well as require State governmental structures, procedures and criteria for land use planning and control decisions cannot be accomplished independently by the Federal Government, it cannot require these of the States on pain of Federal usurpation.

State Versus Federal Interests

The drastic effects of these federally dictated land use policies on Indiana land use planning, even without regard to the federally dictated governmental structures, procedures and criteria, as found by the District Court, JS App., at 21a-25a, are that prime farmland as defined by the Secretary of Agriculture is not prime farmland based on Indiana's land use policies;[28] that the highest and best postmining land use of prime farmland under Indiana land use concepts is not necessarily a farming use; that surface coal mining land use is integrally related to the county government financial well-being in southwestern Indiana to the extent that 50% of one county's total of real and personal property tax revenue is derived from the land use of surface coal mining; and that the electric utilities of Indiana are integrally related to land use of surface coal mining to the extent of purchasing 83% of the Indiana surface mined coal mostly under long-term coal contracts. Furthermore, the result of the federally dictated land use policies will be to displace the surface coal mining land use in Indiana in favor of underground coal mining land use.[29] However, due to the nature of Indiana's underground mineable coal reserves as compared to the reserves of Kentucky and Illinois, this shift will not result in underground mining in Indiana; rather it will shift Indiana surface coal mining into underground mining in Kentucky and Illinois. As in *National League of Cities*, the consequences of the

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[28] The District Court found that the six Indiana counties which produce over 80% of Indiana's coal account for only 5% of its agricultural production. Finding No. 6, JS App., at 15a.

[29] This land use policy was based on the nature of coal reserves in Illinois. Indiana's coal reserves are not the same and do not lend themselves to mining by the underground method, which serves to illustrate the folly of national land use planning. See Conclusion No. 17, JS App., at 35a.

federal intrusion on this attribute of State's sovereignty are in fact disastrous to the separate and independent existence of Indiana.

Assuming that a balancing of Federal and State interests pursuant to *National League of Cities* is required, the State interest is clearly paramount to any Federal interest. The water and air pollution aspects of the Act were not challenged and remain intact. Thus, there are no interstate spill-over effects and a total absence of any national emergency. The prime farmland provisions are directed at a trivial impact on interstate commerce. Finally, the effect under the Act is not short term and there are other available means to protect any Federal interest legitimately involved.

2. Ruling On The Commerce Clause Issues Was Correct

The challenged provisions of the Act were enacted under the Commerce Clause as a result of the asserted effect of surface coal mining on interstate commerce in the form of air and, primarily, water pollution.

In order for an intrastate activity to be subject to regulation under the Commerce Clause, in conjunction with the Necessary and Proper Clause, such activity must have a substantial and adverse effect on interstate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). The judicial focus is on "whether the *particular activity* regulated or prohibited is within the reach of the federal power." *United States v. Darby*, 312 U.S. 100, 120-21 (1941) (emphasis added). With respect to each particular facet of surface mining being regulated, there must be a rational basis in light of the facts and testimony before Congress to support the finding that

the particular facet of surface mining regulated has a substantial and adverse effect on interstate commerce. *Katzenbach v. McClung, supra.* This Court has recognized "that Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968).

Even if a rational basis is found, the inquiry is not complete. The focus under the Necessary and Proper Clause is whether the means chosen by Congress [the challenged provision of the Act] is "plainly adapted to the legitimate end" of alleviating the adverse effect of the particular facet or activity regulated on interstate commerce. Only if such a relationship is found is the provision valid. *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra; M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819).[30]

The Secretary impliedly concedes that the prime farmland provisions of the Act are not related in any way to the alleviation of air or water pollution, and seeks to sustain such provisions because of some asserted effect of surface mining on agricultural productivity and, therefore, on interstate commerce, JS at 10. Contrary to the Secretary's mischaracterization, the District Court did not merely find that surface mining on prime farmland *in Indiana* has a trivial impact on interstate

[30] The fact that other, collateral results will be attained will not invalidate the regulation if, *and only if,* the regulation is otherwise valid, that is, adapted to removing the rationally found substantial adverse effect on interstate commerce. *See Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 163 (1942). Congress may not, " 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.' " *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 326 (1936), quoting *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 423 (1819).

commerce; rather, the District Court found that the record before Congress demonstrated the infinitesimal effect of surface mining on prime farmland *throughout the entire United States.*

The nationwide effect of surface coal mining operations on prime farmland was presented to Congress through the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands* [hereinafter "Report"].[31] The Report included the results of a 1975 study conducted by the Soil Conservation Service, which found that the Nation contains a total of 384,000,000 acres of prime farmland, of which 65% was used for cropland with approximately 134,000,000 acres of prime farmland not in cropland use.

Further studies were conducted based upon the annual production of surface coal mining in the United States in 1977. The studies showed that only 21,800 acres of prime farmland are disturbed by surface mining each year, which constitutes only 0.006% of the total prime farmland in the United States. Thus, it would take 166 years for surface mining to disturb even 1% of the total prime farmland in the Nation.

It was concluded that even if all the prime farmland affected by surface mining in 1977 came entirely out of corn production, the annual effect based on the 1976/77

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[31] The Interagency Task Force Report was prepared by Office of Management and Budget, Soil Conservation Service, Bureau of Mines, Federal Energy Administration and the Environmental Protection Agency. It was presented to Congress with a report entitled *Restoring Soil Productivity On Surface-Mined Land*, Johnson, McCormick and Samson (1977), which was presented to the House Committee at *Briefing Presentation By The Soil Conservation Service Before The Committee On Interior And Insular Affairs*, U.S. House of Representatives, April 5, 1977, JS App., at 12a-13a.

crop year would have been less than 0.04%. In comparison, the Federal Government through the Agricultural Stabilization and Conservation Service is paying farmers *not* to grow crops on 5,900,000 acres, which is 200 times the amount of prime farmland disturbed annually be surface coal mining. Clearly, such *de minimis* effect does not constitutionally justify or "serve as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz, supra,* at 196 n.27.

The Secretary attempts to cloud the issue by ignoring the evidence before Congress and citing only to a general House Report [JS at 10 & n.6], which contains no facts, and to the remarks of a Senator in floor debates.[32] However, even the legislative history relied on by the Secretary recognized that there is no such rational basis.

> [D]ata contained in the report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moratorium is not justified. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 185 (1977).

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[32] Senators merely raised questions calling for studies to be conducted concerning the effects of surface mining on prime farmland and, therefore, interstate commerce as, "In addition the amendment directs the Secretary of Agriculture to conduct studies on the general impact of surface mining on agriculture." 123 CONG. REC. S8,104 (1977). See also 123 CONG. REC. S8,112 (1977). In the portions of the record relied on by the Secretary, not a single fact was stated or known by the senators regarding the effect of surface mining on prime farmland and food production or the balance of trade, except for the facts set forth in the Interagency Task Force Report. Furthermore, statements by legislators in floor debates are "not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). Such statements have accordingly been granted little weight by this Court. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969).

The Report concluded that "[t]he United States has ample farmland to meet its domestic needs for the foreseeable future," Report at 6, and that the concern for prime farmland is based merely on the belief of some that "there exists an ethical responsibility to retain as much as possible the existing farmlands of this Nation." *Id.*

The Secretary also contends that the approximate original contour, topsoiling, postmining land use and related provisions of the Act are "rational means" of alleviating environmental pollution, JS at 10, again choosing to ignore the record before Congress as well as the express provisions of the Act and relying on the general statements in one page of a House Report. The District Court found that the original contour, topsoiling, prime farmland, and other land use provisions of the Act are totally unrelated to the enhancement of air and water quality. JS App., at 16a. The Act itself supports this conclusion since the Act also contains other provisions, not challenged by appellees, which are the "means" of enhancing air and water quality.[33] Indeed, the prime farmland provisions actually cause or increase water pollution by increasing sedimentation.

The District Court properly concluded that the challenged provisions of the Act are attempts by Congress to regulate facets of surface coal mining operations which have no substantial adverse effect on interstate commerce, and that each provision is not a means reasonably or plainly adapted to any legitimate end permitted under the Commerce Clause, that is, alleviating substantial adverse effects on interstate commerce.

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[33] See pp. 9-10 & nn.9 and 10 *supra*.

3. Substantive Due Process Issue Correctly Decided

The District Court properly concluded that the prime farmland and approximate original contour provisions are arbitrary, irrational and capricious in situations where such requirements are not reasonably necessary to achieve a particular postmining land use. Contrary to the Secretary's claim, not only does the record support the District Court's conclusion, it is apparent on the face of the Act.

The prime farmland provisions are a graphic example. The costly prime farmland provisions are tantamount to economic waste where compliance with such requirements is unnecessary to the attainment of a particular postmining land use, as industrial, residential, and recreational uses. Further, the prime farmland and original contour requirements are not in any way related to the enhancement of air and water quality. Accordingly, the failure to provide for variances from these provisions, where the requirements are not necessary to a proposed postmining land use, renders these requirements arbitrary, irrational and capricious so as to deprive appellees of substantive due process.[34]

The Secretary's assertion that it was "surely a rational distinction" for Congress to determine that "measures appropriate for steep-slope mines are not necessarily

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[34] To the extent that further factual evidence is necessary to support the District Court's conclusion in light of the irrationality of the challenged provisions on their face, appellees presented unrebutted evidence as to the exorbitant costs being incurred by appellee coal companies as a result of the provisions of the Act that are unrelated to air and water quality, which include the prime farmland and approximate original contour provisions. Finding No. 8, JS App., at 24a-25a. It is because of such costs that Indiana surface mined coal, 83% of which is sold to Indiana utilities, has lost its competitive edge over Illinois underground mined coal being purchased by Indiana utilities. *Id.*

desirable in prime farmland areas," JS at 12, merely begs the question. The constitutional test is not merely whether disparate treatment is rational in the abstract; it is whether there is an overriding national interest justifying the difference in treatment and whether there is "a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). Where the discriminatory provisions are enacted pursuant to the Commerce Clause power and the Necessary and Proper Clause, the difference in treatment must be justified by a substantial and adverse effect on interstate commerce. See pp. 20-21 *supra*. The Secretary carefully avoids addressing the foregoing analysis. The District Court properly concluded that there is no overriding national interest which justified the lack of variances for the prime farmland and original contour provisions on lands within the Midwest and particularly Indiana.

The Secretary seeks to overturn the District Court's decision merely by arguing that geographical conditions vary from State to State and, therefore, Congress can regulate differently in light of local conditions. But Congress has allowed variances for the approximate original contour provision in steep slope and mountaintop areas not simply because of the geographical nature of such areas; it has provided for variances in those areas only where it deems that something other than the approximate original contour will result in what it considers to be a higher or better postmining land use. Thus, it has not allowed variances based on geographical conditions, but on the use of the land following mining. Yet Congress did not provide for such variances in light of land uses in the Midwestern States. In other words, it is apparent on the face of the Act that the difference in treatment is not based upon geographical factors; it is based exclusively on land use control considerations.

4. Taking Issue Correctly Decided

In addition to finding parts of § 522 of the Act invalid as constituting a "taking" without just compensation, the District Court also found that the prime farmland requirements[35] constitute a taking of property without just compensation in violation of the Fifth Amendment. JS App., at 40a-42a.

It is technologically impossible to reclaim prime farmland to its premining yield under high levels of management. Consequently, mine operators will not be able to demonstrate that the land can be reclaimed to its prior productivity in order to obtain a permit to mine on prime farmland. The record also demonstrates that appellee coal companies own coal rights under prime farmland and intend to mine the same. Since the coal companies cannot make the requisite showing, they will not be able to mine such land. The coal companies' mineral interests will be destroyed. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Accordingly, the coal companies' property will be taken without just compensation.

5. Procedural Due Process Issue Decided Correctly

The District Court properly ruled that § 518(c) violates procedural due process guarantees by requiring

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[35] The provisions involved are those which require that, before a permit will be granted for surface mining on prime farmland, the regulatory authority must find that the operator has the technological capability to restore such land to equivalent levels of yield, § 510(d)(1), that the prior productivity of the land under "high levels of management" be set forth in the reclamation plan as the target yield, § 508(a)(2)(C), and that a bond on prime farmland may not be released until the soil productivity has been returned to equivalent levels of yield as nonmined prime farmland in the surrounding area under equivalent management practices, § 519(c)(2).

mine operators charged with a violation of the Act to prepay the proposed civil penalty in order to obtain a hearing, see *Fuentes v. Shevin*, 407 U.S. 67 (1972), thereby being forced to purchase their due process rights.

The only exception to the constitutional requirement that persons be given an opportunity for a hearing before their property is taken, is where there is a valid governmental interest that justifies postponing the hearing until after their property is taken. See *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). There is no such exigency in this case. The only asserted interest is one of administrative convenience in that if, following a hearing, it is determined that a violation did occur, the Federal Government need take no further measures to collect the penalty. There is simply no authority for the proposition that personal constitutional guarantees can be swept aside for the mere sake of administrative or bureaucratic convenience.[36] Therefore, the District Court

[36] The constitutional infirmity inherent in § 518(c) is not cured by the fact that the Secretary's regulations provide an opportunity for a "conference" before the proposed penalty must be paid into escrow. Such an informal conference cannot in any way be characterized as a meaningful opportunity for a hearing where it is held before the same "prosecutor" which has alleged the violation in the first place.

Furthermore, the fact that the "refund-with-interest" requirement in § 518(c) may mean that mine operators who are subsequently found not to have violated the Act will suffer no financial injury is irrelevant. It is the deprivation of property prior to a hearing that draws the Fifth Amendment's safeguards to bear, not whether the person deprived comes out with a loss at the end. Moreover, in light of the fact that civil penalties can range up to $5,000 per violation, and each day of continuing violation can be deemed to be a separate violation for purposes of the assessment of a penalty, § 518(a), alleged violators face the potential hardship of coming up with thousands of dollars in order to purchase their due process rights. That such sums may be returned with interest after a hearing does not avoid the hardship of having to come up with that huge amount in the first place.

properly concluded that § 518(c) violates the procedural due process requirements of the Fifth Amendment.

CONCLUSION

The District Court's decision was correct in all respects and, accordingly, should be affirmed.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General, State of Indiana
JACK R. O'NEILL
Deputy Attorney General, State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6357

For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR.
BYRON L. MYERS
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
(317) 635-1213

For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 101(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201(b) (Supp. 1979), provides:

> **§ 1201. Congressional findings**
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> The Congress finds and declares that—
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> * * *
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> (b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

Sections 102(c) and (k) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(c) and (k) (Supp. 1979), provide:

> **§ 1202. Statement of purpose**
>
> It is the purpose of this chapter to—
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> * * *
>
> (c) assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;
>
> * * *

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

* * *

Section 503(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1253(a) (Supp. 1979), provides:

§ 1253. **State programs—Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness**

(a) Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth-month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this chapter, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this subchapter for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 1272 of this title provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.

Section 504(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254(a) (Supp. 1979), provides:

§ 1254. Federal programs—Promulgation and implementation by Secretary for State

(a) The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty-four months after August 3, 1977, if such State—

(1) fails to submit a State program covering surface coal mining and reclamation operations by the end of the eighteen-month period beginning on August 3, 1977;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program: *Provided*, That the Secretary shall not implement a Federal program prior to the expiration of the initial period allowed for submission of a State program as provided for in clause (1) of this subsection; or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this chapter.

If State compliance with clause (1) of this subsection requires an act of the State legislature, the Secretary may extend the period of submission of the State program up to an additional six months. Promulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this chapter. After promulgation and implementation of a Federal program the Secretary shall be the regulatory authority. If a Federal program is implemented for a State, section 1272(a), (c), and (d) of this title shall not apply for a period of one year following the date of such implementation. In promulgating and implementing a Federal program for a particular State the Secretary shall take into consideration the nature of that State's terrain, climate, biological, chemical, and other relevant physical conditions.

Section 510(b)(1), (2), (4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1620(b)(1), (2), (4) (Supp. 1979), provides:

§ 1260. Permit approval or denial—Basis for decision; notification of applicant and local government officials; burden of proof

Requirements for approval

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

* * *

(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 1272 of this title or is not within an area under study for such designation in an administrative proceeding commenced pursuant to section 1272(a)(4)(D) or section 1272(c) of this title (unless in such an area as to which an administrative proceeding has commenced pursuant to section 1272(a)(4)(D) of this title, the operator making the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit);

Section 515(a) and (b)(2), (4), (8), (10), (11), (12), (14) and (16) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(a) and (b)(2), (4), (8), (10), (11), (12), (14) and (16) (Supp. 1979), provides:

> **§ 1265. Environmental protection performance standards—Permit requirement**
>
> (a) Any permit issued under any approved State or Federal program pursuant to this chapter to conduct surface coal mining operations shall require that such surface coal mining operations will meet all applicable performance standards of this chapter, and such other requirements as the regulatory authority shall promulgate.
>
> **General standards**
>
> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to—
>
> * * *
>
> (2) restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law;
>
> * * *

(4) stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution;

* * *

(8) create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated that—

(A) the size of the impoundment is adequate for its intended purposes;

(B) the impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under section 1006 of Title 16;

(C) the quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream;

(D) the level of water will be reasonably stable;

(E) final grading will provide adequate safety and access for proposed water uses; and

(F) such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial recreational,[1] or domestic uses;

* * *

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to—

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters;

(B)(i) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law;

(ii) constructing any siltation structures pursuant to subparagraph (B)(i) of this subsection prior to commencement of surface coal mining operations, such structures to be certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan;

(C) cleaning out and removing temporary or large settling ponds or other siltation structures from drainways after disturbed

areas are revegetated and stabilized; and depositing the silt and debris at a site and in a manner approved by the regulatory authority;

(D) restoring recharge capacity of the mined area to approximate premining conditions;

(E) avoiding channel deepening or enlargement in operations requiring the discharge of water from mines;

(F) preserving throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semiarid areas of the country; and

(G) such other actions as the regulatory authority may prescribe;

(11) with respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine working or excavations, stabilize all waste piles in designated areas through construction in compacted layers including the use of incombustible and impervious materials if necessary and assure the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of this chapter;

(12) refrain from surface coal mining within five hundred feet from active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners: *Provided*, That the regulatory authority shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if (A) the nature, timing, and sequencing of the approximate coincidence

of specific surface mine activities with specific underground mine activities are jointly approved by the regulatory authorities concerned with surface mine regulation and the health and safety of underground miners, and (B) such operations will result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public;

* * *

(14) insure that all debris, acid-forming materials, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and the contingency plans are developed to prevent sustained combustion;

(16) insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations: *Provided, however,* That where the applicant proposes to combine surface mining operations with underground mining operations to assure maximum practical recovery of the mineral resources, the regulatory authority may grant a variance for specific areas within the reclamation plan from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

(A) if the regulatory authority finds in writing that:

(i) the applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(ii) the proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(iii) the applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(iv) the areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(v) no substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this chapter;

(vi) provisions for the off-site storage of spoil will comply with paragraph (22) of this subsection;

(B) if the Secretary has promulgated specific regulations to govern the granting of such variances in accordance with the provisions of this subsection and section 1251 of this title, and has imposed such additional requirements as he deems necessary;

(C) if variances granted under the provisions of this subsection are to be reviewed by the regulatory authority not more than three years from the date of issuance of the permit; and

(D) if liability under the bond filed by the applicant with the regulatory authority pursuant to section 1259(b) of this title shall be

for the duration of the underground mining operations and until the requirements of this subsection and section 1269 of this title have been fully complied with.

Section 515(c) and (e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(c) and (e) (Supp. 1979), provides:

§ 1265. Environmental protection performance standards—Permit regulation

* * *

Procedures; exception to original contour restoration requirements

(c)(1) Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit surface mining operations for the purposes set forth in paragraph (3) of this subsection.

(2) Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b)(3) or (d)(2) and (3) of this section may be granted for the surface mining of coal where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill (except as provided in subsection (c)(4)(A) hereof) by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accord with the requirements of this subsection.

(3) In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is proposed for the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) of this section where—

(A) after consultation with the appropriate land use planning agencies, if any, the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use;

(B) the applicant presents specific plans for the proposed postmining land use and appropriate assurances that such use will be—

(i) compatible with adjacent land uses;

(ii) obtainable according to data regarding expected need and market;

(iii) assured of investment in necessary public facilities;

(iv) supported by commitments from public agencies where appropriate;

(v) practicable with respect to private financial capability for completion of the proposed use;

(vi) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and

(vii) designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site;

(C) the proposed use would be consistent with adjacent land uses, and existing State and local land use plans and programs;

(D) the regulatory authority provides the governing body of the unit of general-purpose government in which the land is located and any State or Federal agency which the regulatory agency, in its discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty days to review and comment on the proposed use;

(E) all other requirements of this chapter will be met.

(4) In granting any permit pursuant to this subsection the regulatory authority shall require that—

(A) the toe of the lowest coal seam and the overburden associated with it are retained in place as a barrier to slides and erosion;

(B) the reclaimed area is stable;

(C) the resulting plateau or rolling contour drains inward from the outslopes except at specified points;

(D) no damage will be done to natural watercourses;

(E) spoil will be placed on the mountaintop bench as is necessary to achieve the planned postmining land use: *Provided*, That all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section;

(F) insure stability of the spoil retained on the mountaintop and meet the other requirements of this chapter;

(5) The regulatory authority shall promulgate specific regulations to govern the granting of permits in accord with the provisions of this subsection, and may impose such additional requirements as he deems to be necessary.

(6) All permits granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the applicant affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the approved schedule and reclamation plan.

* * *

Variances to original contour restoration requirements

(e)(1) Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit variances for the purposes set forth in paragraph (3) of this subsection, provided that the watershed control of the area is improved; and further provided complete backfilling with spoil material shall be required to cover completely the highwall which material will maintain stability following mining and reclamation.

(2) Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a variance from the requirement to restore to approximate original contour set forth in subsection (d)(2) of this section may be granted for the surface mining of coal where the owner of the surface knowingly requests in writing, as a part of the permit application that such a variance be granted so as to render the land, after reclamation, suitable for an industrial, commercial, residential, or public use (including recreational facilities) in accord with the further provisions of (3) and (4) of this subsection.

(3)(A) After consultation with the appropriate land use planning agencies, if any, the potential use of the affected land is deemed to constitute an equal or better economic or public use;

(B) is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site; and

(C) after approval of the appropriate state environmental agencies, the watershed of the affected land is deemed to be improved.

(4) In granting a variance pursuant to this subsection the regulatory authority shall require that only such amount of spoil will be placed off the mine bench as is necessary to achieve the planned

postmining land use, insure stability of the spoil retained on the bench, meet all other requirements of this chapter, and all spoil placement off the mine bench must comply with subsection (b)(22) of this section.

(5) The regulatory authority shall promulgate specific regulations to govern the granting of variances in accord with the provisions of this subsection, and may impose such additional requirements as he deems to be necessary.

(6) All exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan.

Section 518(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(a) (Supp. 1979), provides:

§ 1268. Penalties—Civil penalties for violations of permit conditions and provisions of this subchapter

(a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 1252 of this title or during Federal enforcement of a State program pursuant to section 1271 of this title, any permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 1271 of this title, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given

to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Section 701(28) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28) (Supp. 1979), provides:

§ 1291. Definitions

* * *

(28) "surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ per centum of the tonnage of minerals removed for

purposes of commercial use or sale or coal explorations subject to section 1262 of this title; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entry-ways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; and

* * *

No. 80-231

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,
Appellants,

v.

STATE OF INDIANA, et al.,
Appellees.

On Appeal From The United States District Court For The Southern District of Indiana

BRIEF OF THE STATE OF ILLINOIS, *AMICUS CURIAE* IN SUPPORT OF THE MOTION TO AFFIRM

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
LINDA L. ROSS
Suite 2300
One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7800
Of Counsel.

Printed by the Authority of the State of Illinois—9-80-155

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STATEMENT OF INTEREST

The State of Illinois probably has more at stake in the outcome of this case than any other state of the Union. Illinois ranks third in the nation in number of acres of prime farmlands and contains an abundance of proven recoverable bituminous coal reserves. Illinois' policy, law and regulation is dedicated now, as it was prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), to the maximization of the benefits of these resources and the minimization of harm to its citizenry from their use.

If the judgment of the Federal District Court of the Southern District of Indiana should be overturned by this Court on the basis that the Constitution allows federal government control over the handling of private land (including mineral resources) and the post-mining land use of land in a state, then the right and sovereignty of the State of Illinois and its local citizenry and municipalities to determine land development and use within their borders will be mortally wounded. At least 9 million acres of Illinois prime farmland would be effectively subjected to the status of a federal province, and Illinois and its citizens would be deprived of their reserved rights under the Tenth Amendment to the Constitution of the United States. For these reasons, Illinois supports the State of Indiana, and agrees with the conclusions of the National League of Cities and its other sister states as expressed in their brief as *Amicus Curiae* submitted to this Court in support of the Motion to Affirm the decision below.[1]

The positions urged herein are based upon the premise, expressed at length in the lower Court's decision (Slip Op. pp. 22-25), that the prime farmland provisions of the Act, which were found below to exceed the Commerce Clause power and to invade the Tenth Amendment, will be imposed by the Department of the Interior within the state in any event. The provisions will be imposed directly, in the event a state does not seek or obtain program approval from the Secretary of the Interior, or indirectly, and subject to federal control, in the event a state program is authorized. Illinois supports a strong,

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[1] Illinois expressly reserves its support of the decision below insofar as it might be read to find certain sections of the Act violative of due process of law, except as such findings were made on an "as applied" basis to the specific evidence and facts found before the Court below. In general, pre-mining showings as a condition of permit issuance and bonding provisions are considered by Illinois to be part of a responsible program of regulation of mining. Illinois itself has historically utilized such provisions respecting coal mine permits.

independent state legislative effort to require land preservation and reclamation by coal mining operations, which effort might, in the judgment of state officials and the State General Assembly, include some or all of the same or similar provisions invalidated by the court below as requirements improperly imposed by the Federal government upon states and their citizens.

ARGUMENT

I.

ILLINOIS' STATE AND LOCAL GOVERNMENT FUNCTIONS ARE INFRINGED BY FEDERAL AUTHORITY TO DETERMINE THE LAND USE OF PRIME FARMLANDS AND THE AREA IN WHICH COAL SHALL BE MINED.

Federal designation of land use of reclaimed prime farmland, and determination of lands which are unsuitable for coal mining, will impair the integrity of Illinois' state and local governments, and will diminish their ability to function effectively in a Federal system. The most fundamental loss to Illinois and its citizens that arises from the provisions held unconstitutional by Judge Noland is the ability for the State independently and freely to make its own laws on the subject of the use of its resources and land use within its borders. Under the Act, all Illinois' laws on the subject of coal mining and coal mined land reclamation become subject to the scrutiny of the Secretary of Interior. See Act, § 505, 30 U.S.C. § 1255. While the Commerce and Supremacy Clauses of course enable federal legislation to occupy the field of a subject of interstate commerce, this case represents the well-documented judgment of a federal district court, after full trial, that certain of the requirements imposed by Congress on coal mine operators are directed at a subject having at best a trivial impact on interstate commerce: the handling, replacement and post-mining land use of certain farmlands defined as "prime" because of their favorable crop production capacity and historical use, and the designation of lands unsuitable for mining within a sovereign state.

The Surface Mining Control and Reclamation Act works a severe and disabling injury to the functioning of state and local government in Illinois because of the imposition of federal dictation of the special handling of prime farmlands, an outright usurpation of sovereignty with respect to conditions upon the ability to mine where prime farmlands overlay coal in Illinois, and a displacement of local decision making on the suitability of lands for mining. As will be discussed in the second part of this *Amicus Curiae* brief, almost all Illinois coal mines (both surface and underground)[2] contain overlying prime farmland so as to bring the disputed provisions of the Act into play at almost every significant minesite.

Illinois suffers economically, and state government's delivery of services is directly affected, by the Act's prime farmland requirements. Although Illinois is the nation's fourth largest coal producer, Illinois coal is not very much in demand relative to other state's coal. Despite Illinois' vast reserves and their attractive heat value per pound, the relatively high sulphur content of its coal coupled with stringent air quality and emissions requirements applicable to its combustion have flattened demand for Illinois coal. The federal Act, in Title IV, not directly at issue, imposes a severance tax on Illinois coal.

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[2] It is very important for the Court to realize that underground coal mining is being subjected by the Department of Interior to the same rules as surface mining. See Permanent Regulatory Program. 30 CFR Parts 816, 817, and 823. Very serious technical and legal problems occur as a result of this approach, including the impossibility of assuring restoration of land disturbed for the construction of facilities which will stand for several decades. Judge Flannery, in the judicial review case challenging the Permanent Program regulations found the Secretary to have been too facile in his application of identical rules to underground mines. Virtually all recovery of coal in Illinois is affected by these disputed provisions. Illinois argued unsuccessfully in the District Court that underground mines were not intended to be covered as lands "to be mined" under the Act, Section 510(d)(1), 30 U.S.C. § 1260(d)(1). *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144. (D.D.C. 1980)

Illinois' "share" of the moneys is withheld unless Illinois changes its laws to conform to federal law on the subjects complained of below. This abandoned mined land fund, while of great merit, thus collects the very marginal severance taxes which the Illinois coal market might afford if imposed directly by the state, and holds them "for ransom." Likewise, at this time, some 1860 miners are out of work in the Illinois coal fields, while another 400-600 are working short work weeks. In the past year, five large Illinois coal mines have closed. At least two of these closures are relatable in part to the implementation of the prime farmlands provisions complained of below. The burden of this unemployment is borne directly by Illinois' government, state and local, in the provision of welfare services and the erosion of income tax base. By federal dictation of the terms on which, and whether, coal shall be mined, Illinois' citizens, both the employed and the unemployed, are deprived of a direct voice in their economic and environmental destiny.[3]

Only some 5,000-6,000 acres of Illinois lands are newly mined annually. All of this acreage is subject to prompt, strict reclamation. By contrast, in 1979, some 327,000 farmland acres

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[3] The Act purports, in one of its "findings", specifically Sec. 101(f), to denote the states as the entities which should have the primary governmental responsibility for developing the regulations. The Secretary's interpretation of this finding was to issue his complete set of regulations, and to require states to have regulations "no less stringent than his regulations (30 CFR 730.5). If a state could demonstrate that it had a better alternative for any provision, based on local differences, it could submit them under the "state window" provision (30 CFR 731.13(c). The United States Court of Appeals for the District of Columbia has described the "State Window" as a "one-way mirror." The adopted regulations of the states which have already obtained federal approval, and the lists of problem areas of state submittals for states which have not yet obtained approval, support this description. *In Re: Permanent Surface Mining Litigation*, (Peabody Coal Co., Appellant) No. 80-1308, decided by the United States Court of Appeals, D.C. Cir., July 10, 1980, Rehearing *En Banc* Ordered and Pending.

(not all "prime") were in voluntary "set aside" programs. The federal government paid the owners of those lands more than $7 million dollars not to grow crops. Even if Illinois' annual mined acreage were to double overnight, it still would require some 32 years to mine the land in Illinois set aside deliberately last year to alleviate low prices in the farm commodities markets. In fact, lands mined in Illinois are restored to their optimal use, and rowcrop quality lands must be restored to rowcrop capability under Illinois law. Appendix A is an excerpt of relevant provisions of Illinois law in effect since 1975, well before the passage of the federal Act. Ch. 96½, Ill.Rev.Stats. par. 4507 (1979).

The State also has an interest beyond that of protecting the role of making land use designations. Rights of citizens of the State will be infringed if the prime farmland use provisions are allowed to stand.[4] By requiring a mine operator actually to use the reclaimed land as farmland until yields reach those of surrounding lands, the Act deprives the owner, who farms for a living, of the use of his property during the time the operator must farm the land.[5] The Secretary of the Interior has ruled that the Act allows preparation of the land prior to cropping to continue for up to ten years (30 CFR 823.15(b)) and to require at least three successive years of yield which are equivalent to yields from surrounding farms (30 CFR 823.15

[4] In such a case, this Court has allowed one standing to assert the rights of third persons when enforcement of the challenged provisions against one would result indirectly in the violation of third parties' rights. *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975). The Tenth Amendment expressly provides for the reservation of rights to the States and their citizens of rights not granted to the federal Government.

[5] The State of Illinois has received inquiries from farmer-lessors about the length of time they must wait after mining before they may farm their land again.

(e)(i)). This interpretation indicates that an owner's land could be occupied by the coal mine operator as many as thirteen or more years after mining and neither the Secretary nor the Act puts an absolute maximum time limit for compliance with the Act's requirement to reach equivalent yields other than "a reasonable time." An owner should not be deprived of the use of his land for such long periods of time. His land's use should not be designated by a national legislature constituted of representatives from all fifty states. Further, local governments should not be deprived of their traditional right to designate land use for the length of time which will be required to meet the Act's requirement.[6]

What especially concerns Illinois is Congress' apparent decision that prime farmland, once affected, must be returned to an actual use of crop production, regardless of the legitimate needs of its growing population as traditionally determined by locally chosen officials. One irony of the requirement of returning prime lands to cropland is that it removes from alternate use the very lands whose agricultural productive capacity is most in dispute. The faces of communities can change drastically over a ten to fifteen year period, and state and local governments should be allowed to provide for such changes so there will be no possibility of an operator's having to farm reclaimed land while a growing community expands around him and urbanization thereby occurs on unmined prime farmland in the surrounding area. In Illinois, almost 100,000 acres of prime farmland are taken out of crop production annually, including only 5,000 or 6,000 acres taken temporarily

[6] The constitutionality of the Secretary's rule requiring that where prime farmlands are proposed for mining "the post-mining land use of these prime farmlands will be cropland", 30 CFR § 785.17(d)(1), and related provisions interfering with state and local decisions on land use has been challenged by Illinois in the judicial review case, and was decided adversely to Illinois by the District Court. *In re Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. 1980), appeal pending.

for the use of coal mining. In many communities in Illinois, there is no practicable choice of another type of land to be affected by expansion of communities and public roads and facilities.[7]

Illinois is thus before this Court in less than the happy position of undoubtedly appearing to some of its citizens most concerned with the preservation of farmland and the values of community life associated with farming, to oppose good reclamation law. To the contrary, in fact, Illinois' government finds workable and reasonable as a police power measure, appropriate for a state to enforce, the substance of § 515(b)(7), 30 U.S.C. § 1265(b)(7), which includes the provisions for soil handling and reclamation of prime farmland properly found by the Court below to be outside of Congress' power to impose

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[7] The danger to Illinois from federal control of prime farmland use is not limited to its mining counties. Illinois contains an estimated 23.8 million acres of prime farmland and other farmland which is used to produce rowcrops. Approximately the southern two-thirds of Illinois is underlain by bituminous coal reserves; Illinois contains approximately twenty-five per cent of the nation's bituminous coal reserves. The total of estimated coal reserves in Illinois is 162 billion tons of which 30 billion tons, or roughly 1/8 of the nation's total recoverable coal reserves of all types, is recoverable under present technology. Of this 30 billion tons, about 30-40% is mineable by surface mining methods and the rest are mineable by underground mining methods. Prime farmlands cover at least 50 to 60% of the coal reserves in the state, and are interspersed so as to cover for practical regulatory purposes a much greater percentage of mined land.

Because of the large size of Illinois' coal reserves and other reserves underlying Indiana and Western Kentucky, one practical effect of allowing the Interior Department to prescribe land use controls that help keep this coal from the marketplace is to tend to give to the Interior Department monopoly power over coal resources. Much of the coal mined in the West is coal from federal lands or lands located such that federal lease rights control its being mined. Thus, without paying for the nation's largest energy supply, the federal government, by land use control, can effectively see to the maximization of federal profit from coal development.

upon states and their citizenry. Illinois' own law served in part as a model for these provisions. Other provisions such as § 510(d)(1), 30 U.S.C. § 1260(d)(1), or § 519(c)(2), 30 U.S.C. § 1269(c)(2), contain desirable elements that are acceptable state police power measures if reasonably interpreted.

Whether federal bureaucracy enforces Congress' decree, or whether a State agrees to follow Congress' decree, at the risk of federal imposition of a program, does not alter the fact that Congress has removed from state and local legislative bodies their traditional authority to determine the most appropriate use of certain important lands within their jurisdiction according to their citizens' particular needs, as determined after those local citizens petition their local or state elected officials.[8] Illinois would distinguish this statutory scheme from situations where eligibility to use a "carrot" of federal funds is contingent on adoption of a specific program. While abuses also exist of the "carrot" approach, it is sufficient to note here that the complained of land control provisions are federally enforced in a state even if the state decides to pass up the "carrot". The provisions for federal control of farmland use must be held to be constitutionally faulty, or else the structure of the federal system will have been shattered.

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[8] As examples of cases where land use authority has been found to be the province of State and local governments, see *Warth* v. *Seldin*, 422 U.S. 490, 508 (n. 18) (1975); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 129 (1978).

II.

AFFIRMANCE OF THE COURT BELOW WILL NOT ADVERSELY AFFECT ILLINOIS' PRIME FARMLAND

Illinois addresses this Court as a state committed to preserving to its posterity both the blessings of nature and of the Constitution. At stake in this case are the reserved rights of states and their citizens under the Constitution. Illinois is committed to a long-term effort to secure and protect its natural bounty of prime farmlands against irreversible loss or degradation. Attached as Appendix B, is an Executive Order of Illinois' Governor, dated July 22, 1980, which confirms the policy of the State "to protect, through the administration of its current programs and regulations, the state's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource." In an official statement at a recent federal public hearing on the Illinois "permanent program" submittal, pending at this date before the Secretary of the Interior under § 503 of the Act, 30 U.S.C. § 1253, the Illinois Department of Mines and Minerals declared, in effect, that if court action (such as this) or other events result in a federal scheme of regulation less than adequate to protect Illinois' agricultural resources, it is prepared to work to assure such protection. Finally in Appendix C, there is reprinted a recent statement of Illinois' intent to protect prime farmland and other lands well suited to producing crops, as embodied in Rule 1104 (a Rule promulgated prior to the enactment of the federal Act) which appears in the August 20, 1980 *Congressional Record* at pages S11279; we respectfully ask the Court to take judicial notice of these statements. Careful examination shows that in Illinois' mining counties, one million more acres of rowcrop lands are required, if mined, to be restored to their row-cropping capability than the federal Act requires.

Before the Act became law, Illinois was already strictly regulating surface mining within its borders. Among the most progressive of its regulations was Rule 1104, adopted in 1976, which prescribes topsoil removal, plus detailed requirements for a minimum 48 inches of root medium depth and texture of reclaimed land which was capable of growing rowcrops prior to its being mined. These requirements were developed by soils scientists with the particular goal of assuring adequate water holding capacity in the reclaimed soil to support rowcrops. They will continue to assure high quality immediate reclamation of coal mined lands.

III.

THE JUDGMENT BELOW IS BASED ON A FULL TRIAL AND AMPLE PRECEDENT, AND IT SHOULD BE AFFIRMED ON THE BASIS THAT THE COMMERCE POWER HAS BEEN EXCEEDED AND THE TENTH AMENDMENT INFRINGED

At stake in this case is Congress' usurpation of a traditional role, not ever exercised in like manner by individuals, which belongs to states and localities: the governmental role of land use designation for land within their respective jurisdictions. If this Court allows Congress to designate land use for land which has been mined, premised on what the Court below properly found to be a trivial percentage of the acreage of concern, the precedent will be established for Congress to designate land use for any land, anywhere in the nation. If Congress may designate land use and handling for reclaimed land from which coal has been removed, and has long since entered into the stream of commerce, then Congress may presumably make land use decisions for land from which corn, soybeans, cattle, timber, cotton, and any other product of the land are taken and are sent into the stream of commerce. If coal, which is taken from 5,000 to 6,000 acres of Illinois' land annually, affects interstate commerce substantially to warrant Congressional decree of land uses and handling, then all the more substantial an effect will be made by grain, which comes from hundreds of thousands of acres of Illinois. If the provisions of this Act, found below to be violative of the Tenth Amendment, are allowed to stand, there is no clear or perceivable limit to the authority of Congress to designate the use of lands owned by private individuals.

Past opinions of members of this Court contain expressions that in a representative government such an ours, the sole restraints on the Commerce power lie within Congress. "The wisdom and the discretion of Congress, their identity with the

people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), (dissent by Justice Brennan, et al, quoting *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824).). Unfortunately, the actual legislative history of a proposed amendment to the federal Act in question here is proof that this avenue of protection is undependable, and can be expected to be undependable whenever representatives from many states can combine to order control over private resources and land use within a relative few. S. 1403 passed the Senate in September of 1979 by a vote of 68-26, but was stopped by a single representative in the House, who would not allow the bill to be voted on or discussed, despite a request to do so from a majority of the House Subcommittee of which he is Chairman, to which the bill was sent. S.1403 was then attached to a House bill in August of 1980 and passed the Senate once again, this time by a voice vote. Conference committee members have been chosen, not one of whom is from Illinois or Indiana.[9]

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[9] The mention of S. 1403 is illustrative of the undependability of Congress to protect resources in a limited number of states. S. 1403, itself, while quite helpful to the restoration of balance in the administration of the Act, would not reach or moot the issues presented by this case.

The undependability of Congress in restraining itself in its exercise of the Commerce power manifests itself in ways other than parliamentary maneuvers, or the "tyranny" of a majority. One member of the Senate recently sponsored an amendment to a renewed attempt to obtain passage of S. 1403, by Amendment No. 1496, to H.R. 1197. This amendment appears in a peculiarly open-ended way to authorize the Secretary of Interior to promulgate regulations for operation on prime farmlands in 30 CFR 823, in its form at the (future) date of enactment, together with any future changes the Secretary "on his own motion" may choose. Yet, under repeated inquiry, the Senator stated to his colleagues that in proposing his amendment he was "honoring [Judge Noland's] opinion." 126 Cong. Rec. S. 11399 (daily ed. Aug. 22, 1980). A casual review of the case below demonstrates the obvious inaccuracy of the statement.

Illinois produces vast amounts of grains and livestock, as well as a large amount of coal. Its government, and its local governments, have traditionally functioned as designators of land use. The Act, while displacing them from this role, thereby absorbing on behalf of the federal government one of the powers which has traditionally made state and local governments viable, and useful, members of a federal system, makes government less responsible to the people it affects.

CONCLUSION

The Court below had the benefit of a full record from a fair and full hearing, and took approximately one year before issuing its Order. The decision is well considered and is supported by ample precedent. Illinois urges this Court to affirm its holding that the Commerce Power has been exceeded and the Tenth Amendment infringed, in order to preserve to posterity a balanced government, properly and practically responsive to its people.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
LINDA L. ROSS
Suite 2300
One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7800

Of Counsel.

APPENDIX

APPENDIX A

Illinois Law Requiring Restoration of Productive Capacity, Effective July 1, 1975

Ill. Rev. Stat., 1979, Ch. 96½, par. 4507. Duties of Operator

§ 6. Duties of Operator. Every operator to whom a permit is issued pursuant to the provisions of this Act may engage in surface mining upon the lands described in the permit upon the performance of and subject to the following requirements with respect to such lands:

* * *

(j) When the Director determines that the land to be affected is (1) capable of being reclaimed for row-crop agricultural purposes and suitable for row-crop agricultural purposes based on United States Soil Conservation Service soil survey classifications of the affected land prior to mining, and (2) when the Director determines that the optimum future use of the land affected is for row-crop agricultural purposes, the affected land shall be graded to the approximate original grade of the land provided that the final cut and submerged roadways may remain if the Department determines that such final cut or roadways could form a water impoundment capable of supporting desirable uses such as water for livestock or wildlife; and if to be used for fish life, shall have minimum depths in accordance with standards for fish stocking as recommended by the Department, and provided further that the box cut spoil shall be graded in accordance with subparagraph (a) of Section 6:

The reclamation requirements in this Section do not apply to affected land used for a sanitary land fill if such sanitary landfill is approved by the Environmental Protection Agency. The Environmental Protection Agency may regulate the amount of land to be used for the purpose and may establish a time schedule for the orderly and timely completion of such

sanitary landfill. Any affected land designated for sanitary landfill and not used for such purpose within 5 years is subject to the reclamation provisions of this Section;

On all affected lands to be graded to the approximate original grade under this subsection (j) all or part of the darkened surface soil, as defined in this Act, shall be segregated during the stripping process and replaced as a final cover as a last step in the required grading. When available in such depth, at least 18 inches of the darkened surface soil shall be segregated and replaced. When less than 18 inches of darkened surface soil exists all such lesser amounts shall be segregated and replaced. In no case under this subsection (j) shall less than the top 8 inches of surface soil, darkened or not, be segregated and replaced. This segregation and replacement requirement may be altered by the Department only if it is determined upon the advice of competent soil scientists that other material available in the cast overburden would be suitable in meeting the reclamation requirements. Below the darkened surface soil the replaced material shall be suitable as an agricultural root medium. The Department shall determine by rules and regulations what constitutes a suitable agricultural root medium of composition and depth. On all lands to be reclaimed under this subsection (j), the operator shall not be required to create a soil condition better than that which existed prior to surface mining;

APPENDIX B

STATE OF ILLINOIS

EXECUTIVE ORDER Number 4 (1980)

PRESERVATION OF ILLINOIS FARMLAND

The natural resources of Illinois—land, minerals, water, and air—are both finite and fragile. In the absence of wise use and consistent management practices, these resources are threatened by irreversible damage or loss. Protection of the State's natural resources is essential to guard the public health, safety, and welfare, and to assure an adequate natural resource supply and quality for use and enjoyment by future generations.

Since World War II, the amount of Illinois land dedicated to agriculture has steadily declined at an average rate of aproximately 100,000 acres per year. This substantial loss of farmlands is the equivalent of eight average-sized Illinois counties. If this trend continues, the State will lose the equivalent of another five or six counties by the end of the century.

The conversion and loss of agricultural land has diminished Illinois' cropland base and affects environmental quality. The supply of land most suitable for farming is finite. Conversion of this land to urban development and other non-farm uses reduces future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois. With less prime farmland available, there will tend to be greater reliance on marginally productive land, resulting in greater soil erosion, increased fertilizer requirements and increased environmental damage. Loss of agricultural land can also reduce the beneficial role which the land itself can play. Agricultural land reduces runoff by absorbing precipitation, aids in replenishing groundwater supplies and can buffer environmentally sensitive areas from encroaching development.

The importance of preserving our agricultural land base has been recognized by the Illinois Rural Planning Council, the Task Force on the Future of Illinois, and in the State's "Comprehensive Growth and Resource Conservation Policies". Each of these efforts recommends that the State minimize the conversion of prime farmland that results from the direct or indirect effects of State programs and also encourages the achievement of related goals, such as reducing the loss of soil through erosion.

Agencies of the Executive Branch perform numerous functions which effect the management of Illinois' natural resources, including the conversion of prime agricultural land. Decisions on State grants and capital improvements may have significant impact on the conversion process, yet often they may not adequately recognize that agricultural land is a finite resource that can be irretrievably diminished as a result of State actions.

Currently there is no single policy or coordinating mechanism to ensure that State actions do not unnecessarily encourage the conversion of prime farmland to non-farm uses, particularly when there may be alternatives available that are less destructive to our best agricultural lands.

Accordingly, I order the following:

I. It shall be the policy of the State of Illinois to protect, through the administration of its current programs and regulations, the State's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource.

II. The Department of Argiculture shall be the lead agency for implementing this policy in the State of Illinois.

A. The agencies named below shall each prepare and submit to the Governor, with a copy to the Illinois Department of Argiculture, and Agricultural Land Preservation Policy no later than one year from the

effective date of this Executive Order. This policy shall include an analysis of the impact on agricultural land conversions caused by their programs, regulations, procedures and operations. The policy shall also detail measures that can be implemented by the agency which will mitigate conversions to the maximum extent practicable. Each policy shall provide for a greater degree of protection for Classes I, II, and III lands than for Classes IV through VIII (as defined by the U.S. Department of Agriculture). The agencies are: Capital Development Board, Department of Conservation, Department of Commerce and Community Affairs, Environmental Protection Agency, Institute of Natural Resources, Department of Mines and Minerals, the Department of Transportation, Bureau of the Budget, and the Illinois Commerce Commission.

B. Those named State agencies shall participate in an inter-agency committee chaired by the Illinois Department of Agriculture to solve mutual problems in meeting the objectives of agricultural land preservation.

C. The Department of Agriculture will analyze State funded capital projects that impact farmland conversion and advise the Governor's Office as to the consistency of agency actions with the policy established by this Executive Order.

D. After the second anniversary of this Executive Order, all conversions of agricultural lands by any State agency shall meet the criteria specified in that agency's Agricultural Lands Preservation Policy.

III. EFFECTIVE DATE

This Executive Order shall become effective on July 22, 1980.

James R. Thompson
Governor

APPENDIX C

* * *

SENATOR PERCY:

I would like to submit for the RECORD a copy of a letter I received this morning from Mr. Douglas Downing, supervisor of the land reclamation division of Illinois' Bureau of Mines and Minerals, in which he affirms Illinois' total commitment to prime farmland reclamation and a 1982 grandfathering sunset.

* * *

STATEMENT TO SENATOR CHARLES PERCY FROM THE ILLINOIS DEPARTMENT OF MINES AND MINERALS ON PRIME FARMLAND AND CROPLAND RECLAMATION

The State of Illinois has consistently and historically advocated quality reclamation. We have every intention of promulgating and enforcing a law and regulations which carry out the requirements of P.L. 95-87. Two specific examples will prove that Illinois had the goal of good reclamation before the federal law was passed, and that we continue to impose requirements in excess of the federal law to insure retention of agricultural capability on the maximum number of acres.

First, in 1976, Illinois enacted Rule 1104, developed by soils scientists of international reputation from the University of Illinois and other Illinois schools. Rule 1104 has been adopted by the Illinois legislature for the permanent program, even though the federal law doesn't require it. During the permanent program, under Rule 1104 standards, operators will be required to return to rowcrop capability, land which does not meet the definition of prime farmland, but which is nevertheless

capable of producing rowcrops. By contrast, the federal regulations merely require that such land be revegetated. Since there are approximately 1,023,181 acres of land in Illinois mining counties which would be subject to Rule 1104 standards but not to prime farmland requirements, this means that Illinois would require a return to rowcrop capability for over one million acres more than would federal law alone.

Second, the State of Illinois was the originator of the idea to limit prime farmland grandfathering to 1982. Such a limitation has been placed on every single exemption granted by Illinois despite the fact that no time limitation is contained in the Federal Act or has ever been contained in adopted federal regulations. However, OSM has adopted this idea and is now proposing it as part of its proposed exemption regulations.

To date, Illinois has issued permits for approximately 2,700 acres upon which a prime farmland restoration plan has been submitted and approved. The federal prime farmland standards will apply. More acreage will be subject to these standards as time goes on, since Illinois has always interpreted the grandfather clause as a transition exemption only, as is obvious from the 1982 limitation. Of the acreage grandfathered by Illinois under the federal Act and regulations, only about 12,000 acres of it will actually be mined. Rule 1104 standards apply to grandfathered land. It's time that the facts be made known concerning the reclamation which will be required of grandfathered land in Illinois. The exempted land will have a minimum of eight inches of topsoil saved and replaced. Under the federal prime farmland rules, only a minimum of six inches would have to be saved and replaced. The entire rooting media of exempted land will be 4′ deep. Under the federal prime farmland rules, the rooting media would be 4′ also, unless there was a root inhibiting zone, or fragipan, within the premining surface 4′, in which case the prime farmland rules only require rooting media to the depth of the premining fragipan. Finally, the exempted land will have a rooting media of a mixture of the B-C horizon. Under the

prime farmland rules, a mixture of the B-C horizon is specifically allowed. The exempted land will be released from bond only when capability to achieve 90 percent of premining yield is shown.

Illinois is adopting the prime farmland standards and will enforce them, because there is a negligible difference between those standards and Rule 1104 standards, except for the many acres of fragipan soils in Southern Illinois. However, we will continue to apply Rule 1104 standards to restore the rowcrop capable land that is left out of the federal prime farmland requirements.

DOUGLAS DOWNING

Supervisor, Illinois Department of Mines and Minerals

* * *

FACT SHEET: GRANDFATHERING IN ILLINOIS

(Approximate acreage)

Total Acres Grandfathered[1] To Date (8/80) 29,903.

Prime Farmland Grandfathered, 16, 059.

Prime Farmland Grandfathered which is planned to be mined, 12,143.

Federal Prime Farmland Restoration Plan—Approvals to Date (approximate acreage), 2,700.

Grandfathered land—1104 Reclamation Standards, Minimum of 8″ topsoil salvaged Root Zone 4′ deep.

Federal Prime Farmland Reclamation Standards, Minimum of 6″ topsoil salvaged. Root zone 4′ deep, or less if root inhibiting zone, in which case root zone restored only to depth where premining root inhibiting zone existed.

[1] For convenience, exemptions are requested and granted or denied for entire permit areas, without specifically delineating prime farmland soils within the permit areas. In other words, this figure represents both prime farmland and non-prime farmland.

Root zone of B/C mixture. Texture requirements for root zone: Maximum of 40% clay content.

Root zone B over C or B/C mixture. None.

Prime Farmland and Rule 1104 Land, Illinois Mining Counties (Approximate Acreage):

Prime Farmland, 2,049,800.

Row Crop in Excess of Prime Farmland, 1,025,181.

Prime Farmland Plus Row Crop, 3,074,981.

* * *

SEP 16 1980

No. 80-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., *Appellants*,

v.

STATE OF INDIANA, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Indiana

BRIEF OF THE NATIONAL LEAGUE OF CITIES AND THE STATES OF ARIZONA, HAWAII, KANSAS, LOUISIANA AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE MOTION TO AFFIRM

ROBERT K. CORBIN
Attorney General
The State of ARIZONA

WAYNE MINAMI
Attorney General
The State of HAWAII

ROBERT T. STEPHAN
Attorney General
The State of KANSAS

WILLIAM J. GUSTE, JR.
Attorney General
CARMACK M. BLACKMON
Assistant Attorney General
GARY L. KEYSER
Assistant Attorney General
The State of LOUISIANA

ROBERT B. HANSEN
Attorney General
The State of UTAH

ROSS D. DAVIS
DAVIS & SIMPICH
910 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 833-3640

Attorney for National League of Cities

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

The legal issues of particular concern to the *amici* are:

1. Whether the prime farmlands provisions and procedures in Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act") §§ 501-529, 30 U.S.C.A. §§ 1251-79 (Supp. 1980) exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution, and

2. Whether the same provisions violate the Tenth Amendment.

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MISCELLANEOUS:

X ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth,* in AMERICAN FEDERALISM 1960-1980: CONTRASTS AND CONTINUITIES (A-86) (publication forthcoming U.S. Government Printing Office) 4, 5

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

INTERESTS OF AMICI CURIAE

This *amicus curiae brief* of the National League of Cities and the States of Arizona, Hawaii, Kansas, Louisiana and Utah as *amici curiae* is submitted with the written consent of all the parties. The letters of consent are on file with the Clerk. Rule 36.1. With respect to the States, consent is not required. Rule 36.4.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers their views in the case at bar.

Joining with the NLC on this *amicus curiae* brief are the States of Arizona, Hawaii, Kansas, Louisiana and Utah. The States, having continually exercised their powers tc regulate the use of private nonfederal lands within their borders, have a compelling interest in preserving these integral functions.

The States' and NLC's interest in this appeal is predominantly in the question of the extent to which the federal government is authorized to undertake zoning and land use regulation, activities which traditionally are local and community-oriented in nature and historically the responsibility and the prerogative

of state and local governments. At issue are the circumstances, if any, or the extent to which the federal government can control the use of nongovernment prime farmlands and require state government structures and procedures for land use planning and control under the provisions of Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), §§ 501-29, 30 U.S.C.A. §§ 1251-79 (Supp. 1980).

The relevant provisions of the Statute deal with surface mining on prime farmlands and involve, among other things, mining on prime farmlands, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the governmental structures and procedures for designation of certain lands as unsuitable for surface mining, and the premining administrative review of proposed postmining land use.

The Court below concluded that various portions of Title V of the Surface Mining Control and Reclamation Act of 1977 exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment and declared these provisions to be invalid. The *amici* urge that these decisions of the Court be affirmed.

The Constitutional questions presented in this appeal are raised in the context of the Act, but from the viewpoint of the states and municipalities there are underlying questions which are more far reaching than

the regulation of surface mining. These issues involve the role of states in the federal system as contemplated and protected by the Constitution, and address the Constitutionally mandated organizing principles which govern or should govern the structure and operation of that federal system in which state and local governments must function and discharge their responsibilities.

Stated very succinctly, it is the perception of the *amici* that the cumulative changes in our federal system over the past several decades have not adequately been guided or constrained by any ascertainable organizing principles whatsoever—Constitutional or otherwise. Consequently, in the view of the *amici,* the performance of our federal governmental system has suffered. It has become an increasingly disfunctional form of federalism. Among other obvious deficiencies, contemporary intergovernmental relations have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable.[1] In today's federal system, the answer

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[1] These conclusions are shared, among others, by the Advisory Commission on Intergovernmental Relations which is concluding a study in depth of the federal role in the federal system. For example:

> Over the past twenty years the federal role has become *bigger, broader,* and *deeper*—bigger within the federal system, in the size of its intergovernmental outlays, and in the number of grant programs; broader in its program and policy concerns; and deeper in its regulatory thrusts, preemption proclivities, and the wide range of subnational governments interacting directly with Washington. This is the broad summary conclusion that emerges from this ten volume study and it points to a growing centralization of policymaking. Yet, perhaps surprisingly, this conclusion does *not* produce a com-

grows more vague as to which level of government is in charge of what governmental authority.

In part, it was this equivocal obscurement of responsibility and the associated need for more concise and effective concepts of organization and accountability which in the 1970's energized the NLC, eighteen states and other concerned parties into an active defense of state (and local) government sovereignty against the incursions of the federal government manifested by Congress' efforts to set wage and hour conditions for state and local government employees. In 1976 this Court's ruling in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) was one of the consequences of these efforts. In that case, this Court enunciated the outlines of some Constitutionally mandated organizing principles which if followed in the future would do much to foster and protect the effectiveness of the federal system. But even that ruling continues to be attacked. *See, e.g., Amersbach* v. *Cleveland,* 598 F.2d 1033 (6th Cir. 1979).

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panion generalization that the system's *delivery of services* is infinitely more centralized than its predecessor of a generation ago. What *is* certain is that the current labyrinth of countless intergovernmental relationships—with their multiple vertical, diagonal, curving, and haphazardly horizontal connections—is far more dysfunctional than that of 1960.

The contrasts, then, between the "systems" of 1960 and 1980 are stark, but the continuities between them, along with perplexing paradoxes in both, leave us with an open debate over whether we still have a noncentralized system but with a general consensus that it does not function well. X ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth,* in AMERICAN FEDERALISM 1960-1980: CONTRASTS AND CONTINUITIES (A-86) (publication forthcoming U.S. Government Printing Office)

In the 1980's it is increasingly clear that the principles which led this Court to its conclusions in *National League of Cities,* require reiteration and perhaps clarification as well. In the view of the *amici* the case at bar demonstrates the continuing need to declare limits to the powers under the Commerce Clause when the use of such authorities by Congress jeopardizes the ability of state and local governments to function in the federal system as the Constitution contemplates and mandates. At issue is the efficacy of the nation's system of governance.

SUMMARY OF ARGUMENT

The prime farmlands provisions and other provisions of Title V of the Act as the District Court found, are directed at the use of land and regulate and control the use of land as distinguished from regulating commerce. The provisions of Title V, therefore, exceed Congress' powers under the Constitution in two respects.

Land use controls and planning are a traditional exercise of states' police powers in the interests of public welfare. As such, the regulation of the use of land represents an essential and integral function of state governments. Moreover, in our system of dual sovereignty, state and local land use controls provide the means for the residents of municipalities to express their values and needs and to influence through state and local governments' political systems the future character of their community.

The provisions of Title V of the Act control the use of land and the state government procedures for land use planning. As such they are an exercise of

police powers which are reserved to the states under the Tenth Amendment and are, therefore, beyond the authority of the federal government.

In addition, to the extent that the prime farmlands provisions may be an exercise of the commerce powers, these powers under the Constitution must be constrained as an improper impairment of the ability of states to carry on traditional and integral state functions as these are contemplated by the federal system.

Accordingly, the decisions of the District Court should be affirmed.

ARGUMENT

1. POLICE POWERS ARE BASIC AUTHORITIES RESERVED TO THE STATES; REGULATING LAND USE IN THE PUBLIC INTEREST IS AN EXERCISE OF POLICE POWERS; THE LAND USE RESTRICTIONS IN TITLE V OF THE ACT CONSTITUTE AN EXERCISE OF POLICE POWERS AND ARE BEYOND THE AUTHORITY OF THE FEDERAL GOVERNMENT

Given the particular concern of the *amici* for the ability of states and municipalities to function effectively in the federal system, the *amici* urge that a central question before this Court is the extent of the authority of the federal government, if any, to engage in land use regulation, an activity which traditionally has been an exclusive and central responsibility of state and local governments.

Chief Justice Marshall remarked on the existence in the states of a panoply of legislative powers available for the protection of their welfare and the promotion of local interests: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surren-

dered to the general government; all which can be most advantageously exercised by the states themselves." *Gibbons* v. *Ogden,* 22 U.S. 1, 203 (9 Wheat.) (1824). And three years later, Justice Marshall distinguished this state legislative authority as the police powers. *Brown* v. *Maryland,* 25 U.S. 419, 444 (12 Wheat.) (1827).

The aims and aspirations of state governments—to which ends the police powers constitute the principal means—have been delineated over the years by our courts. For example, Justice Barbour wrote:

> Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says; the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.
>
> . . . .
>
> . . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. *New York* v. *Miln,* 36 U.S. 102, 133, 139 (11 Pet.) (1837).

While the conclusions of the Court in this case with respect to "intrastate commerce" are no longer authoritative, the language cited above would seem still valid as a description of the critical relationships which still exist today between the police powers and the responsibilities and aspirations of state governments to provide for the welfare of their citizens.

Regulation of land use in the interests of the public welfare has been and remains a primary and traditional means whereby state and local governments exercising their police powers, seek to improve the circumstances of their residents. The principles embodied in zoning ordinances have been spelled out by this Court:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.
>
> . . . .
>
> . . . [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 387, 389 (1926).

The propositions set out in *Euclid* have since been reiterated in many decisions in support of state land use controls. Planning and zoning as a means of in-

fluencing the present and future physical development of a community in order to promote social and economic well-being has become a traditional and integral function of state and local governments. *Warth* v. *Seldin,* 422 U.S. 490 (1975). It is a method whereby state and local governments offer individual citizens a means to express their values through the political system and thereby to decree how their communities should develop and grow.

In the view of the *amici,* the requirements of Title V of the Act dealing with surface mining on prime farmlands conflict directly with the laws and the tradition that land use controls are the exclusive prerogatives of state governments and the police powers reserved to them. We understand, of course, that federal powers under the Commerce Clause can coexist with state police powers and that "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby,* 312 U.S. 100, 114 (1941). But the provisions of Title V of the Act under attack here present some distinguishing circumstances.

For the reasons set out at length in its opinion, the court below has concluded that the prime farmland provisions are directed at aspects of surface coal mining which have no substantial or adverse effect on interstate commerce and that, in fact, those same provisions represent land use controls and planning decisions which are intended by the Act to be imposed upon the states. The *amici* agree.

So far as the case at bar is concerned, the prime farmlands provisions and procedures reflect the acts

of the federal government, not as a regulator of commerce among the states as exemplified by commercial mining, but rather as a promulgator of what Senator Byrd (as quoted in the opinion of the court below) describes as "environmental values". *Indiana* v. *Andrus,* No. IP 78-500-C (S.D. Ind. June 10, 1980). These are applied by the federal government to prime farmlands. Under federal precepts and value systems, prime farmlands have special intrinsic worth—apart from their commercial value—which must be protected by federal laws and regulations which, according to the trial court, amount to land use controls. The focus and thrust of the federal regulation is on the land itself—and not on commerce. While controls on the use of lands can affect indirectly the activities of commerce, to regulate the former is quite another matter than the regulation of commerce.

The court below has rightly concluded that Congress lacks the authority to decree such land use controls. The federal government has no police power; this authority was reserved to the states by the Tenth Amendment. Accordingly, to uphold the land use control implicit in Title V of the Act, the United States must exact some other Constitutional power. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146 (1919). But a Constitutional power to decree and apply "environmental values" to the uses of land as in this case is totally lacking. The decision of the lower court should be affirmed.

Implicit in the statutory scheme under attack here is a federal aspiration to use the commerce powers as police powers to coerce the states and to undermine existing state authority and procedures which under our system of dual sovereignty offer individual com-

munities a voice in the decisions involving land use. To hold that the Constitution authorizes such federal power would be to change radically the nature of our federal system and the role and responsibilities of state governments within that system. This should not be done.

2. LAND USE REGULATION IS AN INTEGRAL FUNCTION OF STATE AND LOCAL GOVERNMENTS; CONGRESS MAY NOT USE THE COMMERCE CLAUSE TO MANDATE FEDERAL CHOICES WHICH IMPAIR BASIC STATE AND LOCAL GOVERNMENT FUNCTIONS

The *amici* here urge that even if this Court should find in the Commerce Clause some color of Constitutional authority to support the enactment of Title V of the Act, such use of the federal authority to regulate commerce must be restrained as an unacceptable impairment of state sovereignty and the ability of states to function within the federal system as contemplated by the Constitution and exemplified by the Tenth Amendment.

In the first part of its argument, the *amici* have suggested that the fundamental purpose, indeed the essence of state government, is to advance the safety, happiness, and prosperity of its people and thereby to provide for the general welfare, *Miln*. And further, that zoning, land use planning and control to achieve these ends are basic and integral functions of state and local governments, *Euclid* and *Seldin*. Indeed, as recognized by this Court in these and other cases, there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and land use controls as a traditional means to

achieve these fundamental aims. *See: Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978); *Agins* v. *Tiburon,* —— U.S. ——, 100 S. Ct. 2138 (1980); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).

Accordingly, as demonstrated above, land use control and planning have been and are traditional state governmental activities involving essential decisions as to the conduct of integral functions carried on by states in their sovereign capacities. And the controls of these essential state decisions which Congress sought to wield under Title V of the Act, if permitted, would jeopardize states' ability to function within the federal system as contemplated and protected by the Constitution.

In the case at bar, the trial court found only the most tenuous relationship at best between the regulation of commerce and the requirements of Title V of the Act with respect to the use of prime farmlands. Nevertheless, the government relies, as it must, on the Commerce Clause as authority for the enactment of Title V. The issue presented, therefore, is whether this resort to the commerce power is constrained by Constitutional considerations from the uses contemplated under Title V. We believe that because of the principles set out in *National League of Cities* the answer is affirmative; this use of the commerce powers must be curtailed.

As noted in *National League of Cities,* this Court has "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative

authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. The standard, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence." 426 U.S. at 845. In the context of the case at bar, state and local decisions with respect to the shape, growth, character, and industrial mix of individual communities within the state involve essential aspects of their "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In *National League of Cities,* the Court defined traditional functions as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Zoning and land use planning are the basic and essential means available to state and local governments, utilizing their police powers to control and shape the physical and economic development of a given community in order to promote social and economic well-being for its citizens. And in the aggregate, community-oriented land use controls shape the future of the entire state. This governmental function is, as we have said, the essence of state governance and as such should be held to be beyond the reach of the Commerce Clause impairment contemplated by the land use regulations of Title V of the Act. Consequently, the *amici* urge that the decision of the lower court be affirmed.

In this context, and given the fundamental importance to state governments of land use regulation as a means of protecting its citizens and shaping the

states' future, it seems appropriate to note again that the lower court found that "surface coal mining operations on prime farmlands, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Indiana* v. *Andrus*, No. IP 78-500-C, 10 (S.D. Ind. June 10, 1980). When compared with the extent of impairment of essential state functions which the Act contemplates, in contrast with the traditionally local quality of state and local land use regulation, and considering the importance of the state functions being undermined, and taking into account the value of keeping land use decisions as close as possible to the citizens most directly affected, and considering the alternative means which are available to achieve the national aims expressed in and through the prime farmlands provisions of the Act, the *amici* urge this Court that the federal aims expressed in and through these prime farmlands provisions do not justify the kind of interference with state sovereignty which this federal law contemplates.

Whether one regards the nature and the extent of the impairment of state sovereignty involved here or one balances the character of the federal and state interests involved, the conclusions of the court below seem correct and should be affirmed.

CONCLUSION

The opinions of the *amici* urged upon this Court should not be construed as reflecting their views of the problems, both national and statewide, associated with surface mining. Rather, the aim of this *amicus curiae* brief is to alert this Court to the dangers for states and municipalities implicit in the wrong disposition

of the Constitutional questions before this Court. In a very real sense at issue is the continuing viability of the federal system contemplated by the Constitution and the sovereignty of the states within that system.

It is not the aim of the *amici* to turn back the clock, to return to the precepts of *Hammer* v. *Dagenhart,* 247 U.S. 251 (1918) in lieu of the scope of *United States* v. *Darby,* 312 U.S. 100 (1941). But this brief could be construed, at least in part, as an attack on the legislative mode embodied in Title V of the Surface Mining Control and Reclamation Act. It is typically intrusive and coercive. It seeks to impose on the states the federal will and the federal standards without regard to costs or consequences to the states. The methods which Congress has chosen to pursue its federal interests is a bad method because, among other reasons, the statute has been enacted, it seems, without a manifest concern for the requirements of state sovereignty. The Act demonstrates a lack of appreciation for the need to protect and foster a federal system in which state governments retain their attributes of sovereignty and thereby their ability to discharge their Constitutional responsibilities within that system.

From the viewpoint of the *amici* the immediate substantive issue before this Court is whether under the Commerce Clause authority, the federal government can regulate the use of land as a means of regulating commerce. In the case at hand, the federal government is prepared to assume an active and presumably a superior role over states in decreeing land use controls on a national basis in the interests of "environmental values" or whatever else the federal government may associate with "commerce". With any encouragement

from this Court, the *amici* anticipate that federally mandated land use standards and controls in very short order will become a feature of the federal system of governance.[2]

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[2] This conclusion of the *amici* is based on something more than argumentative conjecture. For example: there are many similarities in legislative methods between Title V of the Act and the Clean Air Act, 42 U.S.C.A. § 7401, *et seq.* (Supp. 1980). The report of the Senate Committee on Environment and Public Works on the Clean Air Amendments of 1977 in discussing "Implementation Provisions" includes the following observations, among others, on land use:

> In the Clean Air Amendments of 1970, the Congress included specific reference to controls on the uses of land as a strategy supplemental to emission limitations in the achievement of ambient air quality standards. It was recognized then that such land use strategies could become particularly effective in the maintenance of clean air and prevention of further deterioration of dirty air.
>
> . . . .
>
> The committee therefore, deemed it appropriate that land use control could be included as a technique for preventing further deterioration. . . .
>
> EPA has promulgated land use regulations. This bill places that EPA authority in a new perspective, precluding any required land use controls for other than maintenance of primary air quality standards. . . .
>
> . . . .
>
> EPA may only impose land-use controls under this bill when a State implementation plan does not provide authority to. . . . S. REP. No. 127, 95th Cong., 1st Sess. 25, 26 (1977).

In sum, the Senate Committee evinced no doubt about the authority of the federal government to resort to land use regulations, but thought its use should be restricted to those instances where its use was necessary and appropriate.

The reference to "land use" in the "Implementation Plans" was deleted in conference at the instigation of the House "because of its vagueness". H.R. REP. No. 564, 95th Cong., 1st Sess. 125, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1506. But land use regulation continues to be considered as a part of EPA's methodology.

It is for just these reasons that the *amici* suggest that this Court view the issues before it less as an exquisite question of the ultimate extension of the commerce power and more in terms of the practical organizing principles reflected in the Constitution and the Tenth Amendment. Adherence to these principles is necessary if the federal system is to continue to work effectively in the interests of all the people. The workability of the federal system is the ultimate issue before this Court. For all these reasons, the *amici* urge respectfully that the decisions of the court below be affirmed.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
The State of ARIZONA

WAYNE MINAMI
Attorney General
The State of HAWAII

ROBERT T. STEPHAN
Attorney General
The State of KANSAS

WILLIAM J. GUSTE, JR.
Attorney General
CARMACK M. BLACKMON
Assistant Attorney General
GARY L. KEYSER
Assistant Attorney General
The State of LOUISIANA

ROBERT B. HANSEN
Attorney General
The State of UTAH

ROSS D. DAVIS
DAVIS & SIMPICH
910 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 833-3640

Attorney for National League of Cities

Supreme Court, U.S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

No. 80-231

In the Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

v.

STATE OF INDIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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v.

STATE OF INDIANA, ET AL.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE APPELLANTS

QUESTIONS PRESENTED

The principal regulatory and enforcement provisions of the Surface Mining Control and Reclamation Act of

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior, and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, Peabody Coal Company, and John A. Conlon.

1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are contained in Title V of the statute, 30 U.S.C. (Supp. I) 1251-1279. Among the more important provisions in Title V are those dealing with surface mining on prime farmland, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the designation of certain lands as unsuitable for surface mining, and the pre-mining administrative review of proposed post-mining land uses. The questions presented in this case are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act exceed Congress' power under the Commerce Clause of Article I, Section 8, of the Constitution.

2. Whether the same provisions violate the Tenth Amendment.

3. Whether the "prime farmland" and approximate original contour provisions in Title V of the Surface Mining Act violate the Due Process Clause of the Fifth Amendment because they are arbitrary and capricious or impermissibly discriminate among coal mine operators in different states.

4. Whether the provisions in Title V concerning the reclamation of prime farmlands after surface mining and the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment.

5. Whether Section 518(c) of the Act, which requires a coal mine operator to deposit the proposed amount of a civil penalty into an interest-bearing escrow account before seeking full administrative review, violates the Due Process Clause of the Fifth Amendment.

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30 C.F.R. 785.17(d)(1), 44 Fed. Reg. 15374 (1979) 24
30 C.F.R. 823.11(c), 823.15(b) and (c), 44 Fed. Reg. 15451-15452 (1979) 23

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42 Fed. Reg. 62661 (1977) 29
44 Fed. Reg. 15318-15319 (1979) 2
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Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) 15

OPINION BELOW

The opinion of the district court (J.S. App. 1a-44a) is not yet reported.

JURISDICTION

The final order and judgment of the district court (J.S. App. 45a-49a) was entered on June 10, 1980. The Secretary of the Interior filed a notice of appeal to this Court on June 16, 1980 (J.S. App. 50a-51a). The Court noted probable jurisdiction on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution, the Fifth and Tenth Amendments to the Constitution, and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 55a-68a.

STATEMENT

1. Like *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), probable jurisdiction noted, Nos. 79-1538 and 79-1596 (Oct. 6, 1980), this case involves a broad constitutional challenge to numerous important provisions of the Surface Mining Act. Because of geographical differences between Virginia and Indiana and the resulting differences in the methods and effects of surface coal mining operations in the two states, many of the specific provisions attacked in the present case are different from the "steep slope" provisions that were the primary focus of plaintiffs' complaint in *Virginia Surface Mining*. Plaintiffs' legal theories in the two cases are virtually identical, however.

The basic structure of the Surface Mining Act is described in the Secretary's brief in the Virginia case at pages 2-7.[1] The specific provisions of the Act challenged by the State of Indiana and the other plaintiffs below are listed in the district court's opinion (J.S. App. 3a-5a). A brief description of these provisions follows.

First, plaintiffs attack several sections of the Act referred to collectively as the "prime farmland" provisions. These sections establish certain special requirements for surface coal mining operations conducted on land that qualifies as prime farmland under a definition promulgated by the Secretary of Agriculture and that has historically been used as cropland within the meaning of the Secretary of the Interior's regulations. See Section 701(20) of the Act, 30 U.S.C. (Supp. I) 1291(20).[2] In particular, Section 510(d)(1) of the Act provides that an application for a surface mining permit on prime

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[1] A copy of the Secretary's brief in *Virginia Surface Mining* has been sent to plaintiffs in the present case.

[2] Section 701(20) provides:

> [T]he term "prime farmland" shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register.

The Secretary of Agriculture's definition is found at 7 C.F.R. Part 657, and is incorporated into the Secretary of the Interior's permanent regulations implementing the Surface Mining Act by 30 C.F.R. 701.5, 44 Fed. Reg. 15320 (1979). See also *id.* at 15318-15319 (defining "cropland"), and 30 C.F.R. 716.7, 42 Fed. Reg. 62693-62694 (1977), the interim regulation defining "prime farmland" for purposes of the Act's initial phase. The United States District Court for the District of Columbia remanded the latter regulation to the Secretary for reconsideration on grounds not directly relevant here. See *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1312 (1978), aff'd in part and rev'd in part on other grounds, 627 F.2d 1346 (D.C. Cir. 1980). The Secretary has promulgated a proposed new regulation defining "prime farmland" for purposes of the interim program. See 44 Fed. Reg. 33625 (1979).

farmland may be granted only if the mine operator can demonstrate its "technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management * * *." The operator also must show that it can "meet the soil reconstruction standards" for prime farmland set forth in Section 515(b)(7). 30 U.S.C. (Supp. I) 1260(d)(1), 1265(b)(7). Section 515(b)(7) generally requires that, if surface coal mining operations are to be conducted on prime farmlands, the distinct soil horizons must be separately removed, segregated, stockpiled, and then properly replaced and regraded. Furthermore, Section 519(c)(2) provides that, upon the completion of mining activities on prime farmland, a mine operator's performance bond will be released only on a showing that soil productivity "has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices * * *." 30 U.S.C. (Supp. I) 1269(c)(2).

In addition to the prime farmland provisions, plaintiffs challenge a variety of more general sections in the Act applicable uniformly throughout the country. These include Section 515(b)(3)'s requirement that mined land be restored to its approximate original contour and the command in Section 515(b)(5) that surface mine operators remove topsoil separately during mining activities and preserve it for use during reclamation if it is not to be replaced immediately on the backfill area of the mining cut. 30 U.S.C. (Supp. I) 1265(b)(3), (5).[3] Plaintiffs object generally to the provisions in Section 508 of the Act that require applicants for surface mining permits to include in their application proposed

[3] Section 515(b)(3) states the approximate original contour requirement applicable generally to surface mining operations; plaintiffs in *Virginia Surface Mining* challenged the approximate original contour provision in Section 515(d) of the Act, which is applicable only to surface mining operations on steep slopes.

reclamation plans specifying the intended post-mining use for the land involved and the method by which that use will be achieved. 30 U.S.C. (Supp. I) 1258. Plaintiffs also complain about Section 522 of the statute, which provides that states wishing to assume primary regulatory authority over surface mining operations within their borders during the permanent program phase must establish and implement a planning and administrative review procedure for determining whether particular lands are unsuitable for some or all kinds of surface mining. 30 U.S.C. (Supp. I) 1272(a), (c), (d).[4]

Like the plaintiffs in *Virginia Surface Mining*, plaintiffs here also object to Section 522(e)'s general injunction against mining within 100 feet of roadways and cemeteries or within 300 feet of public buildings, schools, churches, public parks, or occupied dwellings. 30 U.S.C. (Supp. I) 1272(e)(4) and (5). Finally, like the plaintiffs in *Virginia Surface Mining*, plaintiffs in the present case raise a due process challenge to the procedure for collecting proposed civil penalties under Section 518(c) of the Act. 30 U.S.C. (Supp. I) 1268(c).

2. The present case comprises two companion suits, consolidated for all purposes. Both were filed in August 1978, the first by the State of Indiana and several of its officials, and the second by the Indiana Coal Association, coal mine operators, and others. Plaintiffs contended: (1) that all the substantive statutory provisions described above (*i.e.*, all the provisions mentioned with the exception of Section 518(c)) are beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the same provisions violate the Tenth Amendment because they regulate land uses, thereby usurping an "in-

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[4] Note 9 of the Secretary's brief in *Virginia Surface Mining* describes generally the progress to date of the states' submission of proposed permanent regulatory programs under Section 503 of the Act and the Secretary's response to those submissions. Like that submitted by Virginia, the proposed program submitted by Indiana was approved in part and disapproved in part. See 45 Fed. Reg. 78482 (Nov. 25, 1980).

tegral governmental function" traditionally reserved to and performed by the states; (3) that the provisions of the Act dealing with reclamation of prime farmlands and restoration of mined lands to their "approximate original contour" violate the substantive due process and equal protection guarantees of the Fifth Amendment because they impermissibly discriminate among mine operators in different states; (4) that the prime farmland provisions of the Act and Section 522's provisions regarding the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment; and (5) that Section 518(c)'s requirement that proposed civil penalties be deposited into escrow as a condition of full administrative review violates due process.

On April 18, 1979, a hearing was held on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. At this one-day hearing, the parties presented several exhibits and affidavits in support of their positions, and eight witnesses testified. Pursuant to a stipulation (A. 48-50), the district court ultimately decided the case on the merits without taking further evidence. On June 10, 1980, the court issued an order (J.S. App. 45a-49a) and opinion (J.S. App. 1a-44a) sustaining each of plaintiffs' constitutional challenges to the Act as described above.[5]

The court adopted plaintiffs' argument that various sections of Title V of the Act exceed Congress' power under the Commerce Clause (J.S. App. 12a-19a), and held that, in any event, the same provisions of the Act violate the reserved rights of the states under the Tenth Amendment (*id.* at 36a). In particular, the court ruled that the portions of the Act dealing with prime farmlands, restoration of mined lands to their "approximate original contour," topsoil replacement, restriction of surface mining in certain locations, and pre-mining review

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[5] The court's opinion consists of "Findings of Fact and Conclusions of Law" adopted *verbatim* from the proposal submitted by plaintiffs.

of post-mining land uses are unconstitutional (*id.* at 46a-48a). The district court also concluded, on equal protection and substantive due process grounds, that the approximate original contour and prime farmland provisions of the Act violate the Due Process Clause of the Fifth Amendment (*id.* at 37a-39a). In addition, the court held that the statutory requirement that mined prime farmland be restored to equivalent levels of productivity offends the Just Compensation Clause of the Fifth Amendment (*id.* at 40a-42a). The court found another unconstitutional taking in Section 522 of the Act, which, with various exceptions, prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling, and establishes procedures for designating lands unsuitable for all or certain types of surface coal mining (*ibid.*). Finally, the court ruled that the civil penalty provisions in Section 518(c) of the Act deny mine operators due process and are therefore invalid (*id.* at 43a-44a). The district court's judgment permanently enjoined enforcement of all the foregoing provisions (J.S. App. 45a-49a).

The Secretary filed a notice of appeal to this Court on June 16, 1980 (J.S. App. 50a-51a). On June 25, 1980, the district court denied the Secretary's motion for a stay pending appeal (J.S. App. 52a-53a). On July 2, 1980, Justice Stevens stayed the district court's order pending final disposition of this appeal (J.S. App. 54a). The Court noted probable jurisdiction on October 6, 1980.

SUMMARY OF ARGUMENT

I

The numerous provisions of the Surface Mining Act challenged by plaintiffs do not exceed Congress' power under the Commerce Clause. Although different portions of the Act are disputed in this case, the Secretary's Commerce Clause arguments are essentially the same as

those already advanced in *Virginia Surface Mining* (Br. 20-27).

The district court erred in invalidating the "prime farmland" provisions on the basis of a judicial finding that surface mining operations on prime farmlands "have an infinitesimal or trivial impact on interstate commerce." Not only did this finding accord inadequate deference to the contrary views of Congress, but it also ignored the decisions of this Court establishing that the amount of commerce affected by a particular activity does not determine whether Congress legitimately may regulate that activity under the Commerce Clause.

The district court further erred in concluding that a wide variety of statutory provisions generally applicable to all surface mining operations under the Act are not rationally related to the congressional goal of removing or minimizing the adverse effects of surface mining on interstate commerce. The court arbitrarily confined the legislative purpose of the Act to "the alleviation of water or air pollution" and thus disregarded several other important objectives that Congress hoped to achieve in the statute. In particular, the court failed to consider adequately the congressional desire to preserve the productivity of land subject to surface mining and to protect life and property in nearby communities from the hazards created by surface mining operations. When the full range of legislative goals is considered, the relationship of the challenged statutory provisions to the protection of interstate commerce becomes clear. Moreover, even if the alleviation of water pollution is the only objective considered, the district court was not justified in concluding that statutory provisions such as the topsoil replacement requirement in Section 515(b)(5) of the Act are unrelated to that goal.

II

The statutory provisions challenged by plaintiffs also do not violate the rights reserved to the states under the

Tenth Amendment. The Secretary's primary contentions in this regard are stated in the *Virginia Surface Mining* brief (Br. 28-38), and we rely on them here. The district court erred both by assuming that control of land use is a matter exclusively within the province of state and local governments and by determining that the Surface Mining Act is and was intended to be primarily a land-use measure. This Court's decisions establish that federal legislation authorized by the Commerce Clause does not offend the Tenth Amendment merely because it may affect the use of land in particular states. See, *e.g.*, *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Moreover, the Surface Mining Act does not and was not intended to control the use of land on a long-term basis. In most cases, the Act seeks only to restore surface-mined land to the condition it was in before mining began. Once that is accomplished, the Act imposes no restrictions whatever on the way in which land may be used.

III

The "prime farmland" provisions and the approximate original contour requirement in Section 515(b)(3) of the Act do not violate the substantive due process and equal protection guarantees of the Fifth Amendment. The mere fact that these provisions may have differing impacts in different parts of the country does not show that Congress acted irrationally or that it impermissibly distinguished between one region and another. As the district court observed in *Virginia Surface Mining* (79-1538 J.S. App. 41a), "almost any form of economic regulation will affect some persons or interests more harshly than others." Legislation "adjusting the benefits and burdens of economic life" comes to this Court with a strong presumption of constitutionality, and persons seeking to overturn such statutes bear a heavy burden of showing that Congress acted improperly. Plaintiffs have not carried that burden in this case. Various provisions of the Act may affect certain areas more than

they affect other areas, but that is because geographical conditions are not constant throughout the country. Congress, understandably, has determined that regulatory measures appropriate for steep-slope mines are not necessarily suitable for "prime farmland" mines.

IV

Section 522 of the Act and the "prime farmland" provisions requiring restoration of mined farmlands to the productivity levels of unmined land in the same area under equivalent levels of management do not take private property without just compensation, in violation of the Fifth Amendment. The majority of the Secretary's arguments concerning the taking question are fully explicated in the *Virginia Surface Mining* brief (Br. 39-60), and, once again, we rely on the discussion there.

The district court's invalidation of the "prime farmland" provisions appears to have been based in large part on a misconstruction of the statute. The court distinguished between "high levels of management" and "basic levels of management" and concluded that mined prime farmland could be restored to productivity attained under "basic" management practices but not to that achieved under "high" management practices. These terms are not defined or even used in the relevant statutory provisions, which require only that productivity comparisons between restored prime farmland and unmined land in the surrounding area be conducted on the basis of "equivalent" levels of management. The court essentially defined "high levels of management" to be those levels that would result in productivity beyond that which can be achieved after surface mining; it then held that the restoration requirements of the Act are "technologically impossible" to satisfy in areas where "high levels of management" have been employed. The "prime farmland" provisions were not intended to be interpreted in this artificial way, and the Secretary has not applied them in the manner suggested by the district

court. Duly enacted statutes should not be stricken on the basis of semantic manipulations that distort the regulatory purpose of Congress.

Nor do Sections 522(a), (c), and (d) of the Act take property without compensation. These provisions merely establish procedures for designating certain lands as unsuitable for some or all types of surface mining during the permanent program phase. No such designations have yet been made under the Act, and plaintiffs therefore have not been affected by the statute in any way. If plaintiffs wish to object, they should complain about individual designations when made, not about the statute that provides for the designation process. Section 522 contains several features designed to ameliorate harshness in particular circumstances, and it is impossible to evaluate the effects of the statute until it is applied in a concrete situation.

V

For the reasons stated at some length in the Secretary's *Virginia Surface Mining* brief (Br. 67-71), the civil penalty provisions in Section 518(c) of the Act do not violate the Due Process Clause of the Fifth Amendment.

ARGUMENT

I

THE CHALLENGED PROVISIONS OF TITLE V OF THE SURFACE MINING ACT DO NOT EXCEED CONGRESS' POWER UNDER THE COMMERCE CLAUSE

The district court ruled (J.S. App. 8a-19a) that approximately 21 different provisions in Title V of the Surface Mining Act are unconstitutional because they exceed Congress' power under the Commerce Clause in Article I, Section 8, of the Constitution. The court's decision in this regard was divided into two principal parts. The court held first that the six "prime farm-

land" provisions [6] are "directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce" (J.S. App. 17a). For this reason, the court said, the "prime farmland" provisions are not "reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce" (*ibid.*). With respect to the remaining substantive provisions under attack, which apply to surface mining operations generally, the court did not suggest that the impact of surface mining on interstate commerce is insufficiently significant to justify congressional regulation. Rather, the court assumed that surface mining's only significant effects on commerce involve water pollution or air pollution, determined that such adverse environmental effects are adequately treated elsewhere in the Act, and, on that basis, concluded that all 15 of the generally applicable provisions challenged by plaintiffs are "not means reasonably and plainly adapted to the legitimate end of removing substantial adverse effects on interstate commerce" (*id.* at 19a).

A. As the Secretary has argued in *Virginia Surface Mining* (Br. 23), it is well-established that the Commerce Clause grants Congress plenary power not only to regulate the use and protect the instrumentalities of interstate commerce, but also to regulate activities affecting such commerce. *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971); *Wickard* v. *Filburn*, 317 U.S. 111, 124-125 (1942). The statutory findings concerning the ways in which surface mining affects interstate commerce are summarized in the *Virginia Surface Mining* brief (Br. 20-21), and we do not repeat them here. See Sections 101(c), (g), (h), and (j) of the Act, 30 U.S.C. (Supp. I) 1201(c), (g), (h), and (j). They reveal at least three separate and independent grounds for congressional regulation of surface coal mining and reclamation operations under the Commerce Clause. First, because coal produced

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[6] The six provisions are listed and described at J.S. App. 9a-10a.

from surface mines is a commodity sold in interstate commerce, Congress may act under the Commerce Clause to regulate the conditions under which that commodity is produced. *United States* v. *Darby*, 312 U.S. 100, 115, 122 (1941). Second, because surface coal mining operations adversely affect interstate commerce in agricultural products and other commodities by diminishing land productivity, Congress may exercise the Commerce Clause power to protect those aspects of interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257 (1964). Third, because surface mining operations cause erosion and landslides, contribute to floods and water pollution, and create dangerous conditions for life and property in nearby communities, Congress may act under the Commerce Clause to prevent such adverse environmental effects from burdening interstate commerce.

The district court conceived the purposes of the Surface Mining Act too narrowly and, in particular, ignored Congress' express intent to strike a balance between the Nation's need for coal and the need to protect the environment and "agricultural productivity." 30 U.S.C. (Supp. I) 1202(f). The court also erred in failing to accord appropriate deference to the congressional determination that surface mining on "prime farmlands" adversely affects interstate commerce. The court's finding that such mining operations "have an infinitesimal or trivial impact on interstate commerce" (J.S. App. 12a) was the primary basis for its holding that the "prime farmland" provisions are not authorized by the Commerce Clause. But, as this Court frequently has explained, reviewing courts may not reweigh the available evidence and substitute their factual judgment for that on which Congress has relied in enacting legislation. See the Secretary's brief in *Virginia Surface Mining*, at 47-48. Certainly it was wholly inappropriate for the district court in the present case, after a one-day hearing, to adopt *verbatim* the factual findings and legal conclusions proposed by plaintiffs and, on that basis, to overturn the

considered judgment of an elected legislature, a judgment reached only after a painstaking review of the available data gathered from interested persons of all persuasions during several years of intense legislative endeavor.[7]

The district court's factual finding with respect to the effects of prime farmland surface mining on interstate commerce rests almost entirely on statistics derived from the *Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands* (A. 51-64), which was submitted to the House Committee on Interior and Insular Affairs in April 1977, more than a month after completion of the Committee's hearings on the proposed surface mining legislation and less than three weeks before issuance of the Committee's Report. See J.S. App. 12a-15a; H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977). The Interagency Report suggests only that a complete moratorium or ban on the surface mining of prime farmland is inadvisable as a matter of policy, and, indeed, Congress did not enact any such ban. The Interagency Report does not pretend to examine fully the impact of surface mining on interstate commerce in agricultural commodities, nor does it conclude that the impact is negligible or too small to warrant federal involvement. As explained in the Report of the House Committee, Congress followed the recommendation of the Interagency Report, and rejected the Carter Administration's proposal for a five-

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[7] Although we do not say that judicial adoption of proposed findings submitted by the parties is in itself error, the practice of adopting the entire submission of a single party, to the exclusion of all else, has been repeatedly criticized by appellate courts (see, *e.g.*, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 & n.4 (1964); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 731 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *Leaf* v. *United States*, 588 F.2d 733, 736 (9th Cir. 1978); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir.), cert. denied, 417 U.S. 932 (1974)), and it seems especially inappropriate when used as a basis for holding a federal statute unconstitutional.

year moratorium on surface mining on prime farmlands, specifically because testimony of Soil Conservation Service officials indicated that mined prime farmlands could be restored to their original productivity levels through compliance with the prime farmland provisions now contained in the Surface Mining Act. H.R. Rep. No. 95-218, *supra*, at 184-185.

The district court purportedly was influenced by certain statistics in the Interagency Report comparing the prime farmland acreage being disturbed annually by surface mining to the total prime farmland acreage in the United States (J.S. App. 14a). The Report states that approximately 21,800 acres of prime farmland were being disturbed annually by surface mining at the time of the Report and that this acreage represented .006% of the total prime farmland acreage in the Nation (A. 62). This statistic and others derived from it, together with similar comparisons for the State of Indiana, persuaded the district court that interstate commerce is only minimally affected by surface coal mining on prime farmlands and therefore that Congress lacked power to enact the "prime farmland" provisions.

This is not a viable ground for invalidating legislation enacted under the Commerce Clause. The governing standard is not the volume of commerce regulated by the particular statute under review. As this Court has held, "[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *NLRB* v. *Fainblatt*, 306 U.S. 601, 606 (1939). The question therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activities will in fact have some impact on interstate commerce. *Perez* v. *United States*, *supra*, 402 U.S. at 154-156; *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Wickard* v. *Filburn*, *supra*, 317 U.S. at 127-129. Here, the *cumulative potential* effect of uncontrolled surface mining on prime farmlands throughout the Nation is the critical factor to be considered, not some more narrowly drawn index focusing

on current crop production or the number of acres under cultivation. As the Court said in *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944), "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." See also *Stafford* v. *Wallace*, 258 U.S. 495 (1922).[8]

Even accepting the Interagency Report's statistics at face value, at least 21,800 acres of prime farmland are disturbed each year by surface mining. The Report further indicated that the total prime farmland acreage that might be affected by surface coal mining is approximately 7,000,000 acres. These data were presented to the full Senate by Senator Percy during the floor debate preceding passage of the Act. 123 Cong. Rec. 15713 (1977). In addition, Senator Percy called the Senate's attention to the hearing testimony of Robert L. Masterson, zoning administrator of Knox County, Illinois, who graphically described the losses in agricultural productivity attributable to surface mining operations in his county. *Id.* at 15713-15716; *Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 775-811 (1977). See also 123 Cong. Rec. 15720-15721 (1977) (remarks of Sen. Humphrey); *id.* at 15721 (remarks of Sen. Stevenson). Similar evidence was presented during the contemporaneous hearings before the House Com-

[8] The Court in *Stafford* stated (258 U.S. at 521):

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

mittee (*Surface Mining Control and Reclamation Act of 1977: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, Pt. IV, 95th Cong., 1st Sess. 16-31, 78-92, 159-172, 235-260 (1977)), and the committee report referred to this testimony in summarizing the origins of the "prime farmland" provisions. The report stated (H.R. Rep. No. 95-218, *supra*, at 184):

> The Committee heard testimony from citizens and local officials of Illinois and Indiana requesting that special attention be given in the bill to the protection of prime agricultural lands. Working with officials of the Soil Conservation Service, the Committee added a number of provisions to H.R. 2 designed to insure the proper reconstruction of soil strata within those areas classified as prime agricultural lands.

Taken together, the evidence before Congress was more than sufficient to support a rational legislative finding that surface coal mining operations on prime farmland substantially affect the production of agricultural commodities and thus affect interstate commerce.[9] The Surface Mining Act and its legislative history reflect a careful balancing of the competing interests of agriculture and surface coal mining, and the legislative accommodation should not be disturbed on the basis of a one-day hearing in the district court.

B. Apart from the "prime farmland" provisions, the district court also ruled that several important Surface Mining Act provisions of general applicability are beyond

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[9] Notwithstanding the commentary in the district court's opinion (J.S. App. 14a), it is irrelevant to the present case that the federal government has in the past paid farmers not to grow crops on certain lands. Such subsidies serve an independent purpose with respect to the pricing of agricultural commodities and, more important, they keep the affected lands out of production only temporarily, thereby helping to maintain or improve the soil's productive capacity. Unregulated surface coal mining, by contrast, can be expected to cause long-term or irreversible soil damage.

the scope of the Commerce Clause power.[10] In this regard, the court did not quarrel with the proposition that surface mining operations affect interstate commerce; it declared simply that the measures adopted by Congress are not rationally related to the concededly legitimate goal of protecting commerce from adverse effects attributable to surface mining (J.S. App. 18a-19a). This holding, too, is incorrect.

All of the provisions invalidated by the district court are reasonably calculated to further the legitimate congressional goals of preserving the productive capacity of mined lands, minimizing the adverse environmental consequences that can result from surface mining or inadequate reclamation of mined lands, and protecting the public from health and safety hazards that may be created by surface mining. For example, the approximate

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[10] The stricken provisions are:

(a) Section 515(b)(3), requiring restoration of surface mined land to its approximate original contour;

(b) Section 515(b)(5), requiring separate removal, segregation, and ultimate replacement of topsoil on surface mined land;

(c) Sections 522(a), (c), (d), (e)(4) and (5), requiring permanent regulatory programs under the Act to establish procedures for the designation of particular lands as unsuitable for surface mining, and restricting surface mining within a specified radius of certain buildings, parks, and cemeteries;

(d) Sections 508(a)(2), (3), (4), (8), and (10), stating requirements for reclamation plans to be submitted as part of permit applications under the permanent regulatory program, including descriptions of the pre-mining use of the affected land, the proposed post-mining use, and the methods by which the proposed use will be achieved;

(e) Sections 510(b)(1) and (2), the general provisions governing approval or disapproval of permit applications under the permanent program, invalidated to the extent that they entail regulatory authority review of proposed post-mining land uses; and

(f) Sections 515(b)(19) and (20), requiring revegetation of mined lands and maintenance of such revegetation for a five- or ten-year period after the completion of mining, invalidated to the extent that they may incorporate a requirement of compliance with a post-mining land use plan approved by the regulatory authority.

original contour requirement in Section 515(b)(3) is designed to avoid the continuing harm that can be caused by unreclaimed mining cuts or cuts that have been improperly restored.[11] As the 1977 Senate report concluded,

> If surface mining and reclamation are not done carefully, significant environmental damage can result. In addition, unreclaimed or improperly reclaimed surface coal mines pose a continuing threat to the environment, and at times are a danger to public health and safety, public or private property.

S. Rep. No. 95-128, 95th Cong., 1st Sess. 50 (1977). See also *id.* at 83; H.R. Rep. No. 95-218, *supra*, at 78, 80, 93.[12]

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[11] A representative of the United States Army Corps of Engineers testified in the 1977 House hearings that more than 4,400,000 acres of land in the United States have already been disturbed by surface mining and that 1,900,000 of those acres have not been reclaimed. *1977 House Hearings, supra*, Pt. II, at 69.

[12] Even if the district court had been correct in its apparent assumption that the sole purpose of the Surface Mining Act is "the alleviation of water or air pollution" that may be caused by surface mining operations (see J.S. App. 19a), the court would still have been wrong in its conclusion that the statutory provisions challenged by plaintiffs bear no rational relation to the achievement of this legislative goal. Although the provisions here at issue do not include all the statutory measures intended to help minimize and control water and air pollution resulting from surface mining (see *id.* at 17a-18a), they do contribute to that end. The approximate original contour and topsoil replacement requirements, for example, are designed to prevent erosion and sedimentation and thus to help preserve water quality. Among the remedial actions specifically recommended to the House Committee by the United States Army Corps of Engineers for the prevention of further adverse surface mining effects on the Nation's water resources was the "[s]egregation and preservation of topsoils during, or preceding, mining operations * * * [in order] to provide soil conditions conducive to rapid revegetation after mining * * *." *1977 House Hearings, supra*, Pt. II, at 86.

The district court's conclusion that the challenged statutory provisions are not "reasonably and plainly adapted to removing any substantial and adverse effect on interstate commerce" (J.S.

Congress had a similar purpose in enacting the various provisions in Section 508 of the Act, which require applicants for surface mining permits under the permanent program to inform the regulatory authority of the intended post-mining use for the land involved and the way in which that use will be achieved. The provisions are designed to permit the regulatory authority to ascertain, before mining begins, whether the prospective mine operator has adequately considered the fate of the land after mining is completed and whether the operator has the technological capability to restore the land in the way proposed.

The relevance of the topsoil replacement requirement in Section 515(b)(5) to the legislative purpose of preserving the productivity of mined land is self-evident. See H.R. Rep. No. 95-218, *supra*, at 106-109; *1977 House Hearings*, *supra*, Pt. II, at 86; A. 132 (affidavit of geologist Allen O. Perry). Similarly, Section 522(e)'s restrictions against surface mining near churches, schools, parks, public buildings, and occupied dwellings are plainly directed toward the purpose of ensuring that the extraction of coal does not endanger life and property in mining communities. Section 522's further requirement that permanent state regulatory programs include procedures for the designation of other locations, on a case-by-case basis, as unsuitable for surface mining serves the same end.

App. 19a) is apparently based solely on conclusory assertions by plaintiffs or witnesses testifying on their behalf. For example, Glenn L. Kaffenberger, an employee of AMAX Coal Company, one of the plaintiffs in this case, was asked on direct examination whether, in his opinion, the approximate original contour requirement is related to the control of water pollutants; he replied, "No" (A. 147). Testimony of this kind is not a sufficient basis for a judicial holding that remedial measures adopted by Congress after careful consideration are not rationally related to the legitimate legislative purpose of protecting aspects of interstate commerce from the dangers caused by surface coal mining.

Congress sought to make certain that the production of coal for interstate commerce would not come at the expense of agriculture, the environment, or public safety. Injury to any of the latter interests would have a deleterious effect on interstate commerce. Moreover, Congress' determination that federal intervention is necessary in this area was based in part on a desire to ensure that mine operators in states adhering to high performance and reclamation standards would not be disadvantaged in competition with their counterparts in states with less rigorous regulatory programs. See 30 U.S.C. (Supp. I) 1201(g). The statutory provisions overturned by the district court advance these legitimate goals of Congress and thus are rationally related to the protection of commerce from the adverse impact of surface mining operations.

II

THE CHALLENGED PROVISIONS IN TITLE V OF THE ACT DO NOT VIOLATE THE TENTH AMENDMENT

The district court held that all the statutory provisions challenged by plaintiffs (except for Section 518(c)) violate the Tenth Amendment because they "constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control" (J.S. App. 35a). The court's conclusion apparently was heavily influenced by its findings that the coal-producing counties in Indiana are dependent upon the surface coal mining industry for their financial well-being, that the Act discriminates against surface coal mining in favor of underground coal mining, and that the Act therefore may have the effect of shifting coal mining operations from surface mining in Indiana to underground mining in Illinois or Kentucky (*id.* at 23a-25a).

The district court's Tenth Amendment ruling is incorrect for the same reasons that the similar decision in

Virginia Surface Mining is erroneous. The deficiencies in the legal arguments embraced by the two district courts are discussed in the Secretary's brief in *Virginia Surface Mining* (Br. 28-38), and we rely on that discussion here. We add a few additional comments focused more particularly on the lower court's opinion in this case.

Reduced to its essentials, the district court's decision proceeds according to the following syllogism:

> *Major premise*: Land use control and planning is a governmental function reserved exclusively to the states under the Tenth Amendment.
>
> *Minor premise*: The Surface Mining Act is and was intended to be a federal land use control and planning measure.
>
> *Conclusion*: The Surface Mining Act violates the Tenth Amendment.

The court simply assumes the correctness of the major premise and devotes most of its efforts to demonstrating the undisputed proposition that the Surface Mining Act will have some effect on the way land is used in coal mining areas. The major premise is erroneous, however, and, despite the district court's efforts to prove the contrary, the Surface Mining Act is not a land use measure after the fashion of the zoning ordinances typically enacted by state or local governments.

There is no authority for the district court's unsupported view that land use control and planning is a governmental function reserved exclusively to the states under the Tenth Amendment. Although this Court has recognized that regulation of private land use is within the inherent police powers of the states and their political subdivisions (see, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)), the Court has never held that such powers are exclusive or that the federal government may not regulate private activities that affect interstate

commerce if such regulation has any effect on land use. On the contrary, when a congressional enactment is properly directed toward the promotion or protection of interstate commerce, it is immaterial for Tenth Amendment purposes that the enactment may also have an impact on land use control and planning. See, *e.g.*, *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677-678 (1st Cir. 1974) (upholding a regulation under the Clean Air Act that imposed more stringent parking restrictions than the relevant local zoning ordinance).

If this were not the case, Congress' powers under the Commerce Clause would be severely restricted. For example, a federal water control project authorized under the Commerce Clause may have a substantial effect on state and local land use plans; it may determine the course of future land development in an entire region and may result in the inundation of many acres of land contrary to the desires of state and local planners. Under the district court's reasoning, this significant interference with state and local land use objectives would presumably violate the Tenth Amendment. Similar contentions were long ago rejected by this Court, however, in *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), which held that a federal water project did not contravene the Tenth Amendment merely because it interfered with state water development plans. To cite another example, at least since *Wickard* v. *Filburn*, *supra*, it has been clear that Congress is authorized under the Commerce Clause to regulate the quantity of agricultural commodities that private parties may produce on their land. Even though such regulation plainly affects land use, the Tenth Amendment does not pose any obstacle to such congressional action.

In any event, any actual effects on land use resulting from the challenged provisions in Title V of the Surface Mining Act are temporary and merely incidental to the primary purposes of the statute. The Act's provisions apply to an operator only until the required perform-

ance bond for a mining operation has been released, and that release occurs as soon the Act's reclamation requirements have been satisfied. See Section 519(c)(3), 30 U.S.C. (Supp. I) 1269(c)(3). Contrary to the suggestions in the district court's opinion (*e.g.*, J.S. App. 30a), the Act does not mandate that mined lands actually be used for any specific purpose after reclamation is completed. The Act is concerned with the land's condition and its long-term productive capacity, not the actual use to which an owner may choose to put the land immediately following reclamation. Although the Act encourages the farming of prime farmlands following reclamation, it does not require such use.[13] Once the reclama-

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[13] The Act itself does not explicitly require that a mine operator actually grow row crops on mined prime farmlands during the reclamation period. The Secretary, however, promulgated regulations that impose such a requirement for a portion of the reclamation period. 30 C.F.R. 823.11(c), 823.15(b) and (c), 44 Fed. Reg. 15451-15452 (1979). These regulations were based on a determination by the Secretary that some growing of row crops is necessary to restore the soil productivity of prime farmlands to premining levels and to permit an accurate assessment of whether the productivity has in fact been restored. Notwithstanding this dual justification for the necessity of the regulations if the statutory restoration requirements are to be effectively enforced, the regulations were recently remanded to the Secretary by the United States District Court for the District of Columbia, which concluded that the Act did not authorize the Secretary to require the growing of row crops and that soil productivity could be measured by other means. *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1083, 1106 (D.D.C. Feb. 26, 1980), appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

The validity of the Secretary's prime farmland regulations is, of course, immaterial in this case. Assuming *arguendo* that the Act requires the short-term growing of row crops during the reclamation period, this is no different from other measures designed to restore the land's condition, such as regrading, seeding, or fertilizing. The district court in the District of Columbia rejected both statutory and Tenth Amendment challenges to that portion of the Secretary's prime farmland regulations which requires that "cropland" be designated as the immediate post-mining

tion bond is released, a state is free to exercise its full panoply of regulatory powers over the mined lands.

As the Secretary has argued in *Virginia Surface Mining* (Br. 38), the possibility that an otherwise valid federal statute may have some identifiable adverse impact on a state or local economy is not sufficient to establish a Tenth Amendment violation. Likewise in the present case, it is irrelevant whether the challenged surface mining provisions will result in a shift of coal mining activity from Indiana to underground mines in Illinois or other states. Congress, in exercising its Commerce Clause powers, is not restrained by the fact that the impact of a law may fall more heavily on one state than another. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950).

Finally, the district court also decided that Sections 522(a), (c), and (d) of the Act violate the Tenth Amendment (J.S. App. 47a). This ruling is especially puzzling. The stricken subsections merely provide that states wishing to assume primary regulatory authority over surface coal mining during the permanent program phase must establish a procedure for the designation of individual parcels of land as unsuitable for all or certain types of surface coal mining operations, if a proper showing to that effect is made at a public hearing.[14] The

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use for prime farmland. See 30 C.F.R. 785.17(d)(1), 44 Fed. Reg. 15374 (1979). The court observed that "the restrictions upon the post-mining use of prime farmland apply only to the point of bond release." *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. May 16, 1980), slip op. 5-6 & n.5, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

[14] Lands must be designated as unsuitable for surface mining if the regulatory authority finds, on the basis of a petition and the related written submissions and hearing, that the reclamation required by the Act is not "technologically and economically feasible." Section 522(a)(2), 30 U.S.C. (Supp. I) 1272(a)(2). Lands may be designated as unsuitable for some or all types of surface mining if the regulatory authority determines that the mining activity in question would (i) be incompatible with state or local

provisions in question do not purport to prescribe the uses to which particular lands can be put; they merely create a procedural mechanism for presenting and evaluating claims that particular lands should not be subjected to all or some types of surface mining. Furthermore, Section 522(a)(5) provides that unsuitability determinations "shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels." The designation process does not become operative until the Act's permanent program phase, and, in the absence of any showing that the decisions reached under this process will unreasonably interfere with comprehensive state or local land use planning, the statutory provisions cannot be said to threaten the states' "separate and independent existence." See *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976).

III

THE PRIME FARMLAND PROVISIONS AND THE APPROXIMATE ORIGINAL CONTOUR REQUIREMENT IN SECTION 515(b)(3) OF THE ACT DO NOT VIOLATE THE SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT

According to the district court (J.S. App. 37a-38a), the lack of variance procedures applicable to the prime farmland provisions and the limitation of permissible

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land use plans, (ii) adversely affect fragile or historic lands, (iii) adversely affect renewable resource lands, or (iv) affect natural hazard lands so as to substantially endanger life or property. Section 522(a)(3), 30 U.S.C. (Supp. I) 1272(a)(3).

Sections 522(a), (c), and (d) of the Act were not specifically challenged in the *Virginia Surface Mining* litigation, although the district court's order purports to invalidate and enjoin all of Section 522, not just the surface mining restrictions in Sections 522(e)(4) and (5). See note 24 in the Secretary's brief in *Virginia Surface Mining*.

variances from the approximate original contour requirement in Section 515(b)(3) to mining on mountaintops and steep slopes impermissibly discriminate against operators and states in the Midwest, where there are significant coal reserves located under prime farmland and few or no steep slopes or mountaintops. In addition, the court said (*id.* at 39a), the prime farmland and approximate original contour provisions themselves are so "irrational, arbitrary and capricious" that they "constitute a deprivation of substantive due process in violation of the Fifth Amendment."

We challenge these conclusions. Economic legislation such as the Surface Mining Act carries with it a presumption of rationality that can only be overcome by a showing of arbitrariness or irrationality. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). One who would establish that such a congressional enactment is arbitrary or irrational bears an extremely heavy burden. *Vance* v. *Bradley*, 440 U.S. 93, 97, 111 (1979). A court may not substitute its judgment for that of Congress merely because it believes that Congress was "unwise in not choosing a means more precisely related to its primary purpose." *Id.* at 109. See also *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 19.

Here, the district court's opinion provides no factual or legal basis for concluding that the provisions in question are arbitrary or irrational. The district court failed to mention, and the plaintiffs failed to present, any concrete factual situation in which the prime farmland or approximate original contour provisions have been applied to a mining operation so as to cause an irrational result. By invalidating these important portions of the Act under the rubric of "substantive due process," the district court effectively behaved as a superior legislative body, judging the wisdom of the policy determinations

made by Congress. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). This it is not permitted to do.

Moreover, even assuming *arguendo* that the provisions in question impose a greater burden on mine operators in midwestern states, that is no basis for striking them down as unconstitutional. A claim of arbitrariness or irrationality cannot be founded merely upon a statute's lack of uniform geographic impact. *Secretary of Agriculture* v. *Central Roig Refining Co.*, *supra*, 338 U.S. at 616; *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). As this Court explained in *Central Roig Refining* (338 U.S. at 616; citations omitted):

> Nor does the Commerce Clause impose requirements of geographic uniformity. * * * Congress may devise * * * a national policy with due regard for the varying and fluctuating interests of different regions.

The district court misapprehended the applicable standard for determining whether the challenged provisions impermissibly discriminate among mine operators in different areas. The court thought that, in order for the statute to survive review under the Fifth Amendment, "there must be an overriding national interest justifying such difference in treatment, and there must be 'a legitimate basis for presuming that the rule was actually intended to serve that interest'" (J.S. App. 38a). The lone decision cited by the district court as the source of this standard of review is inapposite, however.

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976), involved a challenge to a Civil Service Commission regulation that classified aliens as ineligible for civil service employment. This Court's decisions have established that classifications based on alienage must be reviewed under a heightened level of judicial scrutiny. See, *e.g.*, *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Graham* v. *Richardson*, 403 U.S. 365 (1971), and the cases there cited. Aliens, by reason of their status as non-citizens, are surely more likely to find themselves at a disadvantage than are

persons living in Indiana, solely by reason of their address. Moreover, as the Court was careful to stress in *Mow Sun Wong* (426 U.S. at 105-116), that case involved the review of an administrative measure not mandated by either Congress or the President. The Court's decision invalidating the regulation was based in large part on the view that the various national interests advanced in defense of the regulation were not within the competence or responsibility of the Civil Service Commission to evaluate and pursue.

Here, by contrast, we are concerned with economic regulatory legislation enacted by Congress. Coal mine operators in Indiana are not a disadvantaged group, and Congress possesses both the responsibility and the competence for adjusting the benefits and burdens of economic life throughout the Nation. In such circumstances, a reviewing court should not overturn the considered judgment of the legislature unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303. The district court therefore erred in applying the more rigorous standard derived from *Mow Sun Wong*.

The short answer to plaintiffs' discrimination complaint is that the characteristics of surface mining operations vary with geography, and geographical conditions are not the same in all affected states. Congress has determined that measures appropriate for steep-slope mines are not necessarily desirable in flatter terrain and prime farmland areas. That is surely a rational distinction for Congress to draw, and the fact that a particular state has more of one kind of mining operation than another does not establish discrimination in violation of the Due Process Clause of the Fifth Amendment.[15]

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[15] Two other district courts have rejected substantive due process and equal protection challenges to the Surface Mining

IV

THE PRIME FARMLAND PROVISIONS AND SECTION 522 OF THE SURFACE MINING ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The district court ruled that three of the six "prime farmland" provisions take private property without just compensation, in violation of the Fifth Amendment. One of these three provisions requires that, as a condition of obtaining a "prime farmland" surface mining permit, mine operators demonstrate their capability to restore the land, within a reasonable time after the completion of mining, to at least the productivity levels of "non-mined prime farmland in the surrounding area under equivalent levels of management * * *." Section 510(d)(1), 30 U.S.C. (Supp. I) 1260(d)(1).[16] A second

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Act. In *Virginia Surface Mining*, the district court held that the Act does not violate the equal protection principle merely because it may have a disproportionate economic effect on steep-slope mining regions such as southwest Virginia. 483 F. Supp. at 435-436 (79-1538 J.S. App. 41a-42a). The court observed that "almost any form of economic regulation will affect some persons or interests more harshly than others." *Id.* at 436 (79-1538 J.S. App. 41a). Similarly, in *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), appeal pending on other grounds, No. 80-49, the district court ruled that the Surface Mining Act does not offend the Constitution by regulating only the surface mining of coal and not the surface mining of other minerals. 80-49 J.S. App. 19a-21a.

[16] Section 510(d)(1) provides that the requirement of a showing of technological capability to restore prime farmland to the productivity levels of non-mined lands shall apply to all permits issued after the date of the Act, August 3, 1977. For this reason, the Secretary of the Interior concluded that Congress intended the "prime farmland" provisions tc apply during the interim, as well as the permanent, phase of the regulatory program. The Secretary's statutory interpretation is reflected in his interim regulations (see 30 C.F.R. 716.7, 42 Fed. Reg. 62661, 62693 (1977)), and this construction of the Act was sustained by the United States Dis-

of the three provisions requires that mine operators actually complete such restoration in order to obtain release of their performance bonds for "prime farmland" projects. Section 519(c)(2), 30 U.S.C. (Supp. I) 1269(c)(2).[17] The third "prime farmland" provision attacked as a taking is simply a reporting requirement that directs mine operators to include in reclamation plans filed as part of "prime farmland" permit applications a statement of the premining productivity of the land, specifying "the average yield of food, fiber, forage, or wood products * * * obtained under high levels of management." Section 508(a)(2)(C), 30 U.S.C. (Supp. I) 1258(a)(2)(C). The district court held (J.S. App. 41a) that these three provisions effect an unconstitutional taking of property because, in the court's view,

> it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved.

The district court's decision that the "prime farmland" provisions violate the Just Compensation Clause is incorrect for several reasons. As in *Virginia Surface Mining*, plaintiffs' taking claims did not focus on any particular properties to which the challenged provisions have been applied, and the district court did not base its ruling on the denial of a surface mining permit for specific prime farmland operations proposed by plaintiffs. As in *Virginia Surface Mining*, the district court did not accord

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trict Court for the District of Columbia in *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327, 336 (1978). This aspect of the district court's decision was not appealed to the D.C. Circuit, and the applicability of the prime farmland provisions during the interim regulatory phase is not at issue in the present litigation. Under Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1), judicial review of the Secretary's implementing regulations may be had only in the United States District Court for the District of Columbia.

[17] Performance bonds are required for all surface mining permits under the Act. See Section 509, 30 U.S.C. (Supp. I) 1259.

proper deference to the congressional determination that particular regulatory measures, adopted after lengthy legislative deliberations, are both feasible and desirable. On the contrary, the district court in the present case appeared to assume (J.S. App. 40a) that the prime farmland provisions could be sustained only if the Secretary came forward with academic studies demonstrating that mined lands can in fact be restored to the productivity levels of non-mined lands in the surrounding area. As in *Virginia Surface Mining*, the district court failed to follow this Court's precedents regarding the showing necessary to establish a taking of private property within the meaning of the Fifth Amendment. The court did not consider other beneficial uses remaining available for prime farmland that may not be surface-mined, nor did it acknowledge the legislature's broad discretion to prevent noxious uses of property. All of these deficiencies are discussed in some detail in the Secretary's brief in *Virginia Surface Mining* (Br. 39-60), and we rely primarily on that discussion. We address one additional point concerning the "prime farmland" provisions.

In arriving at its "finding" that the required restoration of prime farmlands is "technologically impossible," the district court adopted plaintiffs' rhetorical labels for the description of different land management practices and, as a consequence, misconstrued the statute. Sections 510(d)(1) and 519(c)(2) of the Act contemplate restoration of the productivity of mined prime farmlands to levels of yield equivalent to those attained on "nonmined land of the same soil type in the surrounding area under *equivalent* management practices" (emphasis added). In their submission of proposed findings of fact and conclusions of law to the district court, plaintiffs referred to two "levels of management" that could be applied to prime farmlands: "high" levels and "basic" levels. The district court assumed that, under the Act, mined prime farmland must be restored to a productivity level equivalent to that of unmined land under "high levels of management," whenever such "levels of management" are the prevailing practice in the surrounding

area. The court then concluded that, although mined land can be restored to the productivity of unmined land under "basic levels of management," restoration to productivity under "high levels of management" is impossible.

The difficulty with all this, of course, is that the terms "high levels of management" and "basic levels of management" are not defined either in the statute or in the district court's opinion. Indeed, the terms do not even appear in either Section 510(d)(1) or Section 519(c)(2), the two operative prime farmland provisions.[18] Those

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[18] Section 508(a)(2)(C) is the only statutory provision that uses the term "high levels of management." The subsection provides that reclamation plans accompanying permit applications must contain information concerning the pre-mining productivity of the land under "high levels of management." The provision does not define "high levels of management," however, and it does not indicate whether the term is to be contrasted with "low," "basic," "good," or "average" levels of management or with some other standard. The term "basic levels of management" is not found in the Act at all.

We note for the Court's information that among the permanent regulations promulgated by the Secretary was one describing the required contents of reclamation plans for prime farmlands. Such plans were to contain, *inter alia*, a statement of current estimated yields under a "high level of management." The regulation provided that these estimates were to be used as a "predetermined target level for determining success of revegetation." 30 C.F.R. 785.17(b)(8), 44 Fed. Reg. 15374 (1979). This regulation was based on the language of Section 508(a)(2)(C). However, the United States District Court for the District of Columbia, in reviewing the regulation, ruled that the Act requires only that the reclamation plan provide information regarding pre-mining yields under high levels of management and does not authorize the use of such information as a standard of comparison for determining the success of post-mining revegetation in all circumstances. The court emphasized that, under Sections 510(d)(1) and 519(c)(2), restoration capability (at the permit application stage) and restoration success (at the bond release stage) must be measured on the basis of "equivalent" levels of management. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. May 16, 1980), slip op. 4-5, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980). Accordingly, the court remanded the regulation to the Secretary.

provisions state only that productivity comparisons between mined land after restoration and unmined land in the surrounding area must be based on "equivalent" levels of management. The statute does not specify what constitutes equivalence for purposes of the Act. Evidence presented in the district court showed that the terms "high levels of management" and "basic levels of management" have no universally accepted meaning.[19]

In essence, plaintiffs and the district court have interpreted the Act to make the statutory reclamation requirements, by definition, impossible to satisfy. Although the ambiguous term "high levels of management" was not expressly defined in the court's opinion, the court in effect defined it as that level of management which will make it "technologically impossible" for operators to restore prime farmland to the necessary level of productivity. The court thus construed the statute to produce

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[19] In particular, Dr. Donald E. McCormack, Director of the Soil Survey Interpretations Division of the United States Soil Conservation Service, testified that "application of these kind [*sic*] of terms has been very provincial in the United States" (A. 157). He stated that, although the Soil Conservation Service has established a definition of "average" and "high" levels of management for its computer purposes, it has no definition for the term "basic levels of management" (*ibid.*). According to Dr. McCormack, the term "basic levels of management" has not been defined for national purposes and apparently is a term primarily used in Illinois (*id.* at 157-158). Dr. William W. McFee, an agronomy professor, testified that the term "high level of management, of course, is difficult to define. But it's usually accepted as being the type of management employed by a certain percentage of the operators in that area" (A. 136). Mr. Alten F. Grandt, Director of Reclamation for Peabody Coal Company, stated that the terms "high levels of management" and "basic levels of management" are scientific terms within the agricultural community (A. 142), but he provided no definition of the terms. Furthermore, Mr. Grandt testified that "high levels of productivity" are equivalent to "levels of productivity that could be obtained under basic levels of management" (*ibid.*). The overall impression created by a review of the testimony in the district court is that considerable uncertainty exists concerning the meaning of the terms on which the court relied in invalidating the prime farmland provisions.

an absurd result, one that surely was not intended by Congress. Duly enacted legislation should not be overturned on such a tenuous basis. Reviewing courts should interpret statutes to avoid constitutional problems, not to create them. See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960).

Moreover, the evidence presented to the district court fully supports the proposition that the restoration of prime farmland required by the Act is technologically possible.[20] And, even if there were no existing evidence or studies conclusively showing that mined prime farmlands could be restored to the required levels of productivity, that alone would not establish that it is impossible to meet the Act's requirements. The prime farmland provisions are "technology-forcing" measures in the sense that Congress wanted the surface mining industry to develop as rapidly as possible whatever technology is needed to achieve the desired result. In the absence of a specific factual situation involving a thorough but unsuccessful good-faith effort to meet the Act's requirements, there is no basis for a judicial conclusion that the requirements cannot reasonably be met.

B. The district court also held that Sections 522(a), (c), and (d) of the Act are unconstitutional because they "provide a procedure to prevent the removal of coal thereby destroying the mineral interest" (J.S. App. 41a). The court provided no support of any kind for its decision.

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[20] See Def. Exhs. A, B, F, and G (A. 105-108, 121-122, 127-129); the testimony of Dr. Donald E. McCormack (A. 157); the Interagency Report (A. 57-59); and the testimony of Alten F. Grandt, Director of Reclamation for Peabody Coal Company (A. 143-144). See also the letter from John A. Conlon, one of the plaintiffs, in which Mr. Conlon states that "the coal industry is quite capable of returning all surface mine[d] land to pre-mine productivity levels. In some instances, actual improvements have been noted" (A. 110).

Again, the plaintiffs' challenge to these provisions was purely hypothetical; they did not allege or show that the procedures for designating areas as unsuitable for all or certain types of surface mining had ever been applied to them. In fact, Sections 522(a), (c), and (d), by their own terms, are not effective until the Act's permanent program phase becomes operative. See Section 522(a)(1), 30 U.S.C. (Supp. I) 1272(a)(1). Since no permanent regulatory program has yet been implemented in Indiana, plaintiffs could not have made such a showing.

Even if an actual controversy had been presented, the district court's ruling totally ignores the clear language and limited effect of the challenged provisions. Sections 522(a), (c), and (d) merely establish a procedure for designating areas as unsuitable for surface mining. The actual decisions whether a particular area, or any areas at all, should be so designated are to be made by the regulatory authority in the permanent program. The appropriate focus for an aggrieved mine operator's complaint should be such individual designation decisions, not the statute that by itself does nothing more than make such designations possible. In addition, the district court did not mention that, under Section 522(a)(6) of the Act, the designation procedure does not apply to lands on which surface coal mining was being conducted on the date of enactment or "where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977." The district court also failed to weigh the fact that any designation of unsuitability under Section 522 may be limited to certain types of surface mining and leave other types unaffected. In short, the court's ruling that Sections 522(a), (c), and (d) violate the Just Compensation Clause is an ill-considered judgment, adopted directly from plaintiffs' submission, and not the product of any independent examination of the statutory provisions, their method of operation, or their effect on the litigants before the court.

The district court's further decision (J.S. App. 42a) that Sections 522(e)(4) and (5) of the Act take private property by restricting surface coal mining in the immediate vicinity of roads, cemeteries, parks, churches, schools, public buildings, and occupied dwellings is identical to the ruling in *Virginia Surface Mining* regarding these provisions (79-1538 J.S. App. 56a-57a). The Secretary's brief in *Virginia Surface Mining* argues (Br. 52-58) that these narrowly defined restrictions do not violate the Just Compensation Clause. The contentions made there are equally applicable here.

V

THE CIVIL PENALTY PROVISIONS IN SECTION 518(c) OF THE ACT DO NOT VIOLATE THE DUE PROCESS CLAUSE

The district court's procedural due process ruling with respect to the constitutionality of Section 518(c) of the Act merely follows the decision on the same issue in *Virginia Surface Mining*. The Secretary's arguments on this point are fully stated in his brief in *Virginia Surface Mining* (Br. 67-71). We add only the observation that plaintiffs here, like their counterparts in *Virginia Surface Mining*, have made no showing that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or that it caused them injury.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333640 171

JAN 9 1981

MICHAEL RODAK, JR., CLERK

No. 80-231

In The

Supreme Court of the United States

October Term, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

Appellants,

v.

STATE OF INDIANA, OTIS R. BOWEN, M.D., GOVERNOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES

THEODORE L. SENDAK
Attorney General
LINLEY E. PEARSON
Attorney General-Elect
JACK R. O'NEILL
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6200
For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR. *
BYRON L. MYERS
STEPHEN M. TERRELL
For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.
OF COUNSEL:
ICE MILLER DONADIO & RYAN
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213

**Counsel of Record*

Central Publishing Co. Inc., Indianapolis IN 46206

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QUESTIONS PRESENTED

Appellees generally agree with the framing of questions 1 and 2 as stated by the Secretary except that appellees believe presenting the Tenth Amendment issue first will facilitate a better understanding of this case. Hence, appellees present the Tenth Amendment issue before the Commerce Clause issue.

* Appellee corporations have filed with the Clerk of the Court a roster of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates pursuant to Rule 28.1, as amended.

Questions 1 and 2 concern 21 subsections of Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1251-1279 (Supp. I) ["the Act"], which for ease of reference will be referred to generally as the prime farmland provisions [see Appendix A; pp. 5-7 and note 4 *infra*], the pre-permit approval of changes in land use provisions [see Appendix B; pp. 10-11 *infra*], the areas unsuitable for surface mining provisions [§ 522; pp. 8-10 *infra*], the original contour provision [§ 515(b)(3)] and the topsoil provision [§ 515(b)(5)].

Appellees state the remaining questions presented as follows:

3. Whether the prime farmland and approximate original contour provisions of the Act violate the Due Process Clause of the Fifth Amendment because they discriminate against mine operators and the State of Indiana for no legitimate or rational Federal purpose and because they impose arbitrary, irrational and capricious requirements.

4. Whether the prime farmland provisions, particularly the requirement that certain mined prime farmland be restored to its premining productivity under high levels of management, and the provisions requiring a governmental structure, procedures and criteria for zoning land as unsuitable for surface mining, as well as mandating that certain lands be zoned off-limits to "surface coal mining operations," take private property without just compensation in violation of the Fifth Amendment.

5. Whether § 518(c) of the Act violates the Due Process Clause of the Fifth Amendment by requiring a mining operator to prepay the full amount of a proposed civil penalty into escrow before being entitled to a hearing on the fact of the alleged violation or the amount of the penalty.

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OPINION BELOW

The opinion of the District Court [JS App. la-44a] is reported in 14 E.R.C. 1769 (1980).

CONSTITUTION AND STATUTES

The relevant portions of the Constitution of the United States and statutes are set forth in appendices to the Jurisdictional Statement and Motion to Affirm, citations to which are provided in the Table of Authorities.

STATEMENT

Appellees disagree with the Secretary's characterization of the Act and of the specifically challenged provisions. Appellees' response to these characterizations is in the Argument, Part I *infra*.

SUMMARY OF ARGUMENT

I. Through the challenged provisions, the Act operates directly on the States, mandating land use planning policies and controls, as well as governmental structures, procedures and criteria for land use decisions. The "prime farmland provisions" require that a State define prime farmland as defined by the Secretary of Agriculture, that a State require an operator commit to a postmining land use of farming, that the land actually be farmed and that in issuing permits to mine on prime farmland, a State consult with the Secretary of Agriculture. The approximate original contour (AOC), topsoil and prime farmland provisions as applied in Indiana have no variances and are intended to and actually require a row cropping use which cannot be varied even if the reclamation requirements are unnecessary to, or in fact prohibit, certain postmining land uses. The States are required to establish procedures and criteria for the pre-permit approval of changes in the postmining land use by which the reclamation plan requirements result in a required land use for periods of five to ten years. By the areas unsuitable provisions, the States are required to zone areas

where surface coal mining is banned, as well as to establish a procedure whereby, under dictated criteria, other land can be zoned as unsuitable for surface mining.

Land use planning and control is an integral governmental function necessary to the separate and independent existence of the States pursuant to the Tenth Amendment and Federalism principles inherent in the Constitution. Land use planning cannot be viewed and defined by single dimension analysis— as but an exercise of the States' police power subject to preemption by congressional exercises of the Commerce Clause, just as governmental services of police and fire protection, schools, hospitals and parks transcend being viewed solely as an exercise of the police power. Land use planning policies and controls involve evaluating, establishing and zoning wholly intrastate private and State non-commercial, as well as commercial, activities in order to effectuate locally determined policies concerning the nature of and the quality of life in local communities, matters and goals which transcend economics.

Land use planning policies and controls of a State are a hybrid governmental service by which the nature of the existence of local communities is defined, and involve the most fundamental application of local control and accountability, concepts which are at the core of Federalism principles. Moreover, land use planning is an exercise of a State's quasi-property interest in its lands which, if regulated by the Federal Government under the Commerce Clause, would constitute the regulation of the States as States, and raise serious Fifth Amendment questions.

The manner of the exercise of the Commerce Clause power through the challenged provisions in the case at bar is not directed at the relief of a national emergency, nor is it limited in time. These policies will have disastrous consequences for the State of Indiana and some of its local communities, which well demonstrate the folly of Federal land use planning.

II. The Secretary does not contend (except as to prime farmland) nor did Congress have a rational basis to conclude that a change in the utility of surface mined land from industry, housing, forestry, farming or recreation to one or the other uses has a significant adverse effect on interstate commerce. Moreover, Congress had no rational basis to determine that surface mining on prime farmland has any significant adverse effect on interstate commerce. The prime farmland provisions are not a means reasonably and plainly adapted to removing a substantial adverse effect on interstate commerce. None of the challenged provisions are a means reasonably and plainly adapted to alleviating interstate spill-over effects of pollution, or any substantial effect on commerce.

III. On land in parts of the country other than Indiana, variances are allowed if the original contour requirements are unneccessary to and variances will faciliate a given proposed postmining land use. However, the prime farmland and AOC provisions have no variances for lands within Indiana where such provisions are unnecessary to a postmining land use or when they in fact prohibit certain postmining land uses. The denial of such a variance from the prime farmland and original contour requirements as applicable in Indiana is a denial of equal protection and substantive due process pursuant to the Fifth Amendment because the only legitimate purpose is the removal of substantial adverse effects on interstate commerce, which interest these provisions do not serve. To the extent that specific land uses are not required by the challenged provisions as the Secretary asserts, when such provisions are unnecessary to the proposed postmining land use, they are irrational and tantamount to economic waste.

IV. The prime farmland provisions and the areas unsuitable provision constitute a taking of coal in that they deny coal operators any beneficial use of the coal by preventing coal from being extracted. If coal cannot be extracted, it has no use whatsoever and these provisions

prevent the extraction of coal and, therefore, constitute a taking without just compensation contrary to the Fifth Amendment taking clause.

V. The requirement of § 518(c), that proposed civil penalties must be prepaid before the operator is given an opportunity for a hearing in order to contest liability or the amount of the penalty, is contrary to the procedural due process requirements of the Fifth Amendment. If welfare payments cannot be revoked without a hearing, surely money actually earned cannot be taken without a hearing.

ARGUMENT

I. INTRODUCTION: NATURE OF THE CHALLENGED PROVISIONS

Any analysis of the constitutional questions presented must begin with an indepth understanding of the few, but complicated, challenged provisions of Title V of the Surface Mining Control and Reclamation Act,[1] and how these provisions subtly, but quite directly, operate upon the States by dictating land use policies as well as governmental structures, procedures and criteria for making decisions on land use policies, all on pain of Federal usurpation. To the contrary, the Secretary's brief is a calculated attempt to disguise, obfuscate and bury the few challenged provisions within the whole of Title V so as to make it appear that these few provisions are solely related to the private activities of coal operators, and not related or only incidentally related to land use planning and control. The Secretary, for all practical purposes, has now conceded that the challenged provisions are not related to water pollution control, but

---

[1] See § 501 *et seq.* [30 U.S.C. § 1251 *et seq.* (Supp. 1979)] which will be referred to hereinafter by section numbers of the Act. The corresponding U.S.C. cites are provided in the Table of Authorities. The Act is hereinafter referred to as such. The Secretary's brief on the merits in the instant case and in No. 79-1538 will be cited as "Ind. Br." and "Va. Br." respectively.

now contends that the provisions are related to the "productivity" or "utility" of land, which are at the heart of land use planning and control.

The Secretary's attempt to infuse the Indiana case into the Virginia case is but another aspect of the Secretary's effort to obfuscate the issues in this case. There are significant differences. Under the Tenth Amendment issue, while limited aspects of the original contour requirements [§ 515(b)(3), hereinafter "AOC"] are also involved in the Virginia case, a variance from the AOC requirement is allowed for steep slopes and mountaintops based on the proposed postmining land use, while in Indiana no variance is allowed; and in the Indiana case, the prime farmland provisions, areas unsuitable provisions, and the pre-permit land use approval provisions are involved, while they are not in the Virginia case. Under the Commerce Clause issue, the Virginia case challenges the entirety of Title V, while the Indiana case focuses on a few specific provisions [approximately 21 of over 280 subsections].

Before addressing the precise questions presented, appellees will first demonstrate that the challenged provisions of the Act, which the District Court found to be contrary to the Tenth and Fifth Amendments as well as beyond the Commerce Clause power, operate on the States, and then demonstrate that the true nature of those provisions is direct Federal land use planning and control.

(A) The Act Operates Directly On The States

Under the permanent phase of the regulatory scheme established by the Act, each State, in order to retain jurisdiction over the regulation of surface coal mining and reclamation operations as well as the land use planning functions encompassed by the Act, must submit a State Program, including "a State law. . . in accordance with the requirements of this Act" and "regulations consistent with

regulations[2] issued by the Secretary pursuant to this Act" [§ 503(a)(1) and (7)], or else those functions will be usurped by a Federal Program promulgated and administered by the Federal Government [§ 504(a)]. Thus, on threat of Federal usurpation, in order to retain their sovereign land use planning and control functions, the States have no choice[3] but to enact laws and pass regulations containing land use policies as well as providing governmental structures, procedures and criteria for further land use decisions which must be mirror-images of those dictated by the Act.

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[2] The true impact of the requirement that a State program comport to the regulations of the Secretary does not become fully evident until the Secretary's regulations are reviewed [30 C.F.R. §§ 730 *et seq.*, Sub-chapters C, D, F, G, K and L, pp. 977-1252], that is, the 300 pages of fine print regulations constituting further commands of the Secretary which the State Programs must parrot.

[3] As found by its General Assembly, the State of Indiana was "coerced" into enacting enabling legislation so that an Indiana program would comport to the Surface Mining Act, and it did so only to avoid the "Federal encroachment". IND. CODE § 13-4.1-1-1(2) and (4) (Supp. 1980), set forth in Appendix C hereto.

As the Secretary notes, Indiana has submitted a program, including a State statute, which the Secretary found inadequate [Ind. Br. 4 n.4]. A reading of the Secretary's "decision" concerning the Indiana Program illuminates the problems for "our Federalism" of giving Federal bureaucrats review powers over State laws. The Secretary found the Indiana statute insufficient for, among other reasons: (1) it provides for more complete standards of judicial review than allowed under the Act [Finding 27.2]; (2) it requires an adjudicatory hearing, as opposed to an informal conference for objections to a permit [Finding 22.11]; (3) it requires an adjudicatory hearing rather than a legislative type hearing to declare land unsuitable for surface mining [Findings 21.2 and 22.10]; (4) it does not have the same venue provisions for lawsuits, as under the Act [Finding 22.9]; (5) it would change the "common law" for premises liability [Finding 17.7]; (6) it would allow too much information submitted by coal operators to be privileged [Finding 13.3]. [45 Fed. Reg. 78461-499 (1980).] Now the General Assembly of Indiana must change its laws concerning concepts of judicial review and rights of parties to administrative hearings, as well as land use planning, to gain an approved State Program.

(B) Land Use Planning And Control Provisions

(1) *Prime Farmland Provisions.*[4] These provisions are totally unrelated to water pollution control[5] and are singularly and solely land use control and planning devices. These provisions require that: (l) prime farmland be defined as required by regulations of the Secretary of Agriculture without regard to what is actually prime farmland within a State based on State determined land use policies;[6] (2)

[4] The "prime farmland provisions" [§§ 507(b)(16), 508(a)(2)(C), 510(d)(l), 515(b)(7), 701(20) and parts of §§ 515(b)(20) and 519(c)(2)] are described in Appendix A hereto, as well as being set forth verbatim in JS App. and MA App. [see p. viii *supra*].

[5] The prime farmland provisions actually *increase* water pollution by causing sedimentation [JS App. 16a].

[6] The location of prime farmlands in Indiana in reference to surface mineable reserves is set forth on four maps [JA 65-68]. These graphically illustrate the lack of land use conflict between surface coal mining and the use of prime farmlands in Indiana. Exhibit 4 demonstrates that the vast majority of prime farmland is not located over surface mineable coal. Several statistics bear out this graphic illustration based on the maps— six counties in southwestern Indiana [JA 8l-82] account for 80% of the coal produced in Indiana [99% of the coal produced in Indiana is by the surface method, JA 72-75], while these same six counties account for less than 5% of row crop production in Indiana [JA 83-94].

The land use policies behind the prime farmland provisions were based on studies done in Illinois which have no applicability to Indiana. The studies were based on the experience that Illinois, which has large amounts of its surface mineable coal reserves under prime farmland, could meet its coal needs by underground mining [JA 5l-52], where 50% of the coal is mined by the underground method [JA 73]. [In fact, Illinois had laws protecting against this land use conflict, but Senator Stevenson did not trust state "bureaucrats" to exercise the proper discretion. See note 8 *infra.*] The Senator from Illinois constantly repeated this Illinois experience in support of the prime farmland provisions. However, such is not the case in Indiana where 99% of the coal is mined by surface mining [JA 8l] because Indiana's "underground mineable reserves" are poor and not presently mineable [JA 77-80], while 88% of Illinois' coal reserves are only underground mineable [note 8 *infra*]. The result will be to totally displace surface mining in Indiana into underground mining in Illinois and Kentucky [JA 80, l48-52]. Such land use planning in Indiana based on the conditions in Illinois demonstrates the folly of Federal land use planning.

mined prime farmland be returned to farming after mining as a condition to permitting surface mining on prime farmland; (3) the postmining land use be farming for at least ten years;[7] and (4) a State consult with the Secretary of Agriculture before issuing a permit to mine on prime farmland.

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[7] This farming use is required by the express language of the prime farmland provisions. *See In re Permanent Surface Mining Regulation Litigation,* No. 79-1144, slip op. at 5, (D.D.C. May 16, 1980), where in sustaining the validity of 30 C.F.R. § 785.17(d)(1), which requires that an operator commit to row cropping as the postmining land use, held:

> Illinois mistakenly reads Section 515(b)(2) in isolation [*i.e.,* that it affords the operator an open ended choice as to the post-mining land use]. . . . [T]he Act prescribes additional and specific requirements for prime farmland. For example, the SMCRA prohibits release of bond *"until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area. . ."* Section 519(c)(2) of the Act. . . . This equivalency standard could not be achieved absent the post-mining employment of prime farmland as cropland.
>
> Section 510(d)(1). . . corroborates the imposition of an additional requirement for mining on prime farmland: *the land must be reclaimed and used as cropland.* [Emphasis added.]

The required farming use results, in part, because it will take up to ten years of continuous farming to make the demonstrations required for the release of the bond pursuant to § 519(c). The land cannot be returned to prior levels of yield unless an actual farm use is made of the land. See also note 82 *infra,* and discussion of studies, Part V *infra.* The Secretary admitted this fact in his comments to the proposed regulations, 30 C.F.R. § 823.15. [44 Fed. Reg. 15287 (1979), set forth at JS App. 30a.]

In the rules litigation before the District Court for the District of Columbia, *id.,* the District Court issued two separate opinions, Round I, 14 E.R.C. 1083 (February 26, 1980), and Round II, presently unpublished (May 16, 1980). There, the Secretary repeatedly contended that actual row crop use was required by the prime farmland provisions, while in the case at bar the Secretary contended to the contrary. [See Ex. A. to Trial Brief, R. 1294.] Both decisions of the District Court are pending appeal, No. 80-1810 *et seq.* (D.C. Cir. August 26, 1980), and the Secretary recently filed a brief contending in support of his regulation requiring row cropping as the designated use [30 C.F.R. § 785.17(d)(1)] and the regulation requiring three test years of

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The Secretary largely ignores these aspects of the prime farmland provisions and attempts to distort and disguise them by engaging in semantical games, as through the statements that—although the Act "encourages the farming. . . following reclamation, it does not require such use," or—"the Act does not mandate that mined lands actually be used for any specific purpose after reclamation is completed" and the bond is released [Ind. Br. 23]. What the Secretary is disguising, is that the postmining land use of farming is required, as intended by Congress,[8] for at least ten years before the bond is eligible for final release, by which time the opportunity for changing land uses is gone and, therefore, certain land uses are, in effect, prohibited.

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yields or actual cropping usage [30 C.F.R. § 823.15(b)] based on § 508(a)(2)(C), § 510(d) and § 519(c)(2), that "the Act requires that prime farmland be restored to crop land" [Br. 53], "the statute *requires* prime farmland to be restored to prime farmland. This should end the inquiry on the Secretary's authority to require row crop production. . ." [Br. 57], and "in three separate sections of the Act— permit application, permits, and bond release—Congress stressed the importance of yields from prime farmland; only actual production will produce crop yields." [Br. 58; see also *id.*, at 196-203].

[8] [T]hat caveat of a higher or better use [in § 515(b)(2)] is the hooker. That is the loophole you can drive a truck through. I shall tell why. The effect of this amendment [prime farmland provisions] is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. *We are giving all that discretionary authority to some bureaucrat.*

I do not want to do that. . . . [123 CONG. REC. 15719 (1977) (statements of Sen. Culver)].

Eighty-eight percent of this [Illinois] coal can be extracted only by deep mining. Only 12 percent, or about 19.5 billion tons, can be stripped, but about half of our current production comes from strip mines. The deep-mine coal is concentrated in the south-central region of the State.

* * *

Our State has one of the best regulatory statutes, but it is not adequate with respect to prime farmlands. It gives the

(con't)

Despite the Secretary's semantical sleights, it remains that the prime farmland provisions are indeed unadulterated Federal land use planning policies, intended by Congress to be such, which will be implemented in Indiana through a State Program which must meet the Federal requirements, or directly usurped through a Federal Program, formulated and administered by the Federal Government. Even if a State obtains the Secretary's approval of a State Program, the State can issue permits to mine on prime farmland "only after consultation with the Secretary of Agriculture" [§ 510(d)(1)].

(2) *Topsoil And AOC Provisions.* Land use policy concepts are implicit in the AOC, topsoil [§ 515(b)(5)][9] and prime farmland requirements as demonstrated by the absence of variances from the requirements of these provisions. For example, where mining occurs on mountaintops or steep slopes, which are not present in Indiana, variances are provided from the AOC requirement if other than the original contour is "compatible with" a

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director of the department of mines and minerals the discretion to decide whether row crop agriculture is the optimum future use of land to be mined . . . . [123 CONG. REC. 15721 (1977) (emphasis added) (remarks of Sen. Stevenson).

For the first time, the Federal Government would be taking into account that these prime agricultural lands are an invaluable resource to us, and we cannot simply pave over them, we cannot simply urbanize them all— and we simply cannot strip mine them, *unless we assure ourselves that all prime lands that are mined will be returned to their original use and their original level of productivity.* [123 CONG. REC. 15713 (1977) (emphasis added) (remarks of Sen. Percy).]

[9] Section 515(b)(3) requires that mined land be returned to its approximate original contour after mining. For a pictorial translation of this requirement see H.R. REP. NO. 95-218, 95th Cong., lst Sess. 104 (1977). Section 515(b)(5) provides that the topsoil of mined land must be removed, stored and replaced in a separate layer.

proposed postmining land use which is an "equal or better economic or public use" of the affected land, as compared with its premining use [§ 515(c)(3)(A), (e)(3)(A)]. The Act allows no meaningful variances from the AOC, topsoil and prime farmland provisions for lands in the Midwest, even where these provisions are unneccessary to or would prohibit a particular postmining land use as residential, industrial, forestry or recreational uses. In other words, variances are allowed only where the Federal Government has predetermined, there can be an "equal or better economic or public use" of the local land. Variances are not allowed in Indiana because the Federal Government has predetermined that there is no equal or better land use following mining, and in the case of prime farmland, that the highest and best use is farming.

By the Secretary's admission, the reason for the absence of variance provisions from the AOC, topsoil and prime farmland provisions for lands in Indiana is a Federal land use policy "decision."[10] Indeed, that there is no other reason for the refusal to allow such variances in Indiana is apparent from the Congressional Record and the history of the Act. The House and Senate expressly noted that surface mining presents an opportune time to change the use of land,[11] but that variances from the prescribed standards were only permitted where the Federal Government predetermined that a "better" use would result.

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[10] In the Virginia case, the Secretary emphasizes the variances allowed for the AOC requirement on steep slopes in support of his argument that such sections do not impinge upon the sovereignty of the Commonwealth of Virginia [Va. Br. 35], contending that such variance procedures ensure that "[t]he impact of the Act *on the land-use decisions* will thus be no greater than necessary. . ." (emphasis added). If the granting of a variance is a land use decision, the denial of a variance is equally a land use decision.

[11] "[S]urface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses." [H.R. REP. NO. 95-218, 95th Cong., lst Sess. 94 (1977).] (con't)

Moreover, at the time the Act was originally passed by the Senate, a variance was provided from the AOC requirement for all lands, not just steep slopes or mountaintops, based on land use planning considerations.[12] However, in the Committee of Conference, without any rational basis, the uniform land use variance from the "rigid" contour requirement was restricted to only steep slopes and mountaintops, not found in Indiana. Again, the predetermined Federal land use policy is that in Indiana, land uses which could result from such variances are deemed not to be equal or better land uses.

These predetermined Federal land use policies effectuated through the absence of variances are most blatant in the case of the prime farmland provisions. Several Senators remarked at the time of the prime farmland amendments that the mere requirement that land be restored to equal or better use [§ 515(b)(2)] was not considered sufficient for prime farmland, and that a postmining farming use must be required because the Senators did not want State "bureaucrats" to have the discretion to allow a postmining land use other than farming [see note 8 *supra*]. Hence, the absence of variances from the AOC, topsoil and prime farmland provisions demonstrates that the Federal Government predetermined that there can be no equal or better land use, regardless of what may be the local land use planning and control policies or needs.

"[T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably— without rigid contour requirements— there is no reason why further beneficial land uses cannot be carried out on reclaimed land.

* * *

"It must be borne in mind that protection of environmental values does not in every instance require return to an original contour." [123 CONG. REC. 15709 (1977) (remarks of Sen. Byrd).]

[12] See § 415(d), 123 CONG. REC. 15778, 15790 (1977).

(3) *Areas Unsuitable Provisions.* The most flagrant example of federally dictated State governmental structures, procedures and criteria for land use decisions is the areas unsuitable provisions. Section 522(a), (c) and (d) requires that a specific governmental structure and procedure be established [irrespective of Indiana's present structures, procedures and criteria] to zone land unsuitable for surface coal mining and delineates the relevant criteria for such zoning, which are totally unrelated to air and water quality, as whether mining is incompatible with "local land use plans or programs" or affects "fragile or historic lands" where significant damage could result to "important historic, cultural, scientific, and esthetic values. . ." [§ 522(a)(3)]. A permit cannot be issued to mine on land that has been zoned unsuitable for surface mining [§ 510(b)(4)].

The Secretary's response is but to state that the District Court's conclusion that § 522 is solely directed at land use control and planning policies and governmental structures is "especially puzzling" [Ind. Br. 24]. The Secretary fails to comprehend that which is apparent on the face of § 522(a), (c) and (d)— this provision mandates a State to establish a land use policy, procedure, criteria and governmental structures on pain of Federal usurpation with the land use decisions actually being made by the Federal Government. Indiana already has governmental structures, procedures and criteria for such zoning, the authority for which is generally reposed in locally elected County officials, not appointed administrative personnel at the state level as required by § 522 [see IND. CODE § 18-7-4-8, 36, 46; note 34 *supra*]. The only thing that is "puzzling" is the Secretary's failure to comprehend the obvious.

Similarly, as to road relocations and closings, Indiana is mandated by § 522(e)(4) to change its governmental structures and procedures by which such decisions are

presently made through County Commissioners and the Indiana State Highway Commission,[13] or to relinquish its right to make these decisions to the Federal Government. The Secretary, apparently again finding the obvious puzzling, has chosen to ignore this issue. Or maybe the Secretary assumes that it is obvious that the States are no longer competent to determine how to protect State and County highways, or to determine appropriate governmental structures and procedures for road relocations and closings, (i.e., that locally elected County officials should make such determinations as opposed to appointed state level personnel).

In addition, § 522(e)(4) and (5) zones certain lands off-limits to "surface coal mining operations" [defined in § 701(28)], which encompasses innocuous activities such as the parking of vehicles or the storing of materials used in the mining operation, not just mining, blasting or other similar activities. The Secretary, now choosing to distort the Act, counters [Ind. Br. 19] that this zoning is necessary to "ensuring that the *extraction of coal* does not endanger life and property. . . ." (Emphasis added.) If the challenged provision were limited to "coal extraction" as the Secretary claims, at least the Secretary's "characterization" might be correct (which it is not), but even so, it would not change the land use zoning nature of this provision.

(4) *Pre-Permit Approval Of Land Use And Required Land Use Provisions.* The District Court also

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[13] See IND. CODE § 8-20-8-1 *et seq.*; IND. CODE § 8-20-1-1 *et seq.*; Conclusion No. 14, JS App. 34a. Pursuant to § 522, the locally elected Board of County Commissioners will not be able to decide road relocation and closing issues, contrary to the selected Indiana governmental structure, procedures and criteria; rather the State regulatory authority must decide such issues because such changes in State government structure are mandated by § 522 (e) (4), on pain of Federal usurpation of those functions and decisions.

found unconstitutional [JS App. 10a, 11a, 19a] those provisions of the Act which combine to require specific State governmental structures and criteria for approving proposed postmining land uses, again, irrespective of existing State governmental structures and criteria. Through the permitting procedures and reclamation plan requirements of the Act, a State must enact laws to require that a mine operator obtain approval to change the postmining use of the land from that which existed before mining, §§ 507(d), 508(a)(3), (4), 515(b)(19), (20) and 510(b)(1), (2).[14] These provisions resulted in regulations requiring the approval of postmining land use changes,[15] which define precisely what is deemed to be a change in land use, through ten land use categories, ranging from "cropland" to "undeveloped land" [30 C.F.R. § 701.5], and which read like zoning ordinances. The premining land uses must be determined in accordance with whether the land was properly managed and, further, if the premining use of the land was changed within five (5) years prior to its acquisition by the permittee, then the postmining land uses must be compared with the historic use of the land [30 C.F.R. § 816.133(b)]. Not only are specific governmental structures and procedures mandated, but the specific criteria by which the approval of the proposed change in postmining land use will be decided are established and required.

The Secretary fails to meaningfully discuss these pre-permit procedures and requirements of the Act. These are more than mere information requirements. Rather, by these

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[14] See Appendix B *infra*.

[15] In 30 C.F.R. § 701.5, under definitions of land use, it is provided:

> *Land use* means specific uses or management-related activities, rather than the vegetation or cover of the land. . . . Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority.

provisions a permit to mine is conditioned on federally dictated criteria for a required approval of land use changes. Furthermore, by these provisions the Federal Government subtly dictates land use by reclamation and revegetation standards, the completion of which hinges on an actual land use which is designated and required. This use requirement is,again, disguised by the semantic sleight that no land use is required after reclamation is accomplished and the bond is released. But in the interim [the five or ten year period before the bond is eligible for final release, depending on rainfall (§ 515(b)(20))], rigidly structured reclamation and revegetation regulations based on the Act are such that if the designated land use is row cropping (of nonprime farmland), forestry, or fish and wildlife, etc., a mining operator must specifically use the land for such purposes to achieve the requirements before reclamation is deemed completed and the bond is released.[16] To have an approved State Program,

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[16] Not only does the Act require the approval of any changes in the land use from premining to postmining, but the reclamation plan requirements [§ 508(a)(3), (4)], when combined with the requirements for the release of bonds [§ 519(c)], require the actual use of land during the reclamation period, which is up to five or ten years [§ 515(b)(19), (20)]. This result is manifestly clear through the regulations.

For instance, 30 C.F.R. § 807.12(e)(2)(i), (iii) provides that part of the reclamation bond shall be released after "reclamation phase II is completed" which is deemed to be when "[r]evegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met." The revegetation standards directly *require the approved postmining use during reclamation.* Additionally, as to proposed row crop land use (but not on prime farmland), "success in revegetation" is determined by *two years* of actual row crop farming use [30 C.F.R. § 816.116(b)(3)(iii)]. If the postmining use is to be an industrial or residential use, the only ground cover required is that which is required to control erosion [30 C.F.R. § 816.116(b)(3)(ii)]. As to a fish and wildlife land use, success of revegetation is determined on the basis of required tree, shrub or half-shrub stocking and ground cover. [*Id.*, subsection (iv).] In 30 C.F.R. § 816.117 the required ground cover for forestry purposes is set forth which can result in only a forestry land use during the five to ten year period of liability. With respect to approved postmining land uses of range and pasture land, 30

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the States must parrot both the Act and these regulations.

(5) *Miscellaneous.* Finally, the prime farmland, topsoil and AOC provisions, which have no meaningful variances applicable in Indiana, are a part of the federally dictated land use policy of making surface mining an unpreferred land use to underground coal mining and farming, regardless of a State's land use policies and needs.[17] The Secretary does not and cannot refute this land use control and planning policy of the Act. In fact, many viewed these provisions of the Act not merely as a land use preference for underground coal mining and farming land uses, but rather viewed the Act as the beginning of the phase-out of surface mining in the United States.[18]

C.F.R. § 816.115 originally required that the land actually be used for two years for grazing and, as to prime farmland, this is deemed to be when the soil productivity has been returned to the level of yield as was required by 30 C.F.R. § 785.17 [suspended pending appeal].

As to the actual bond release in the final Phase III of reclamation, originally the permittee must have "successfully completed. . . the implementation of any alternative land use plan approved pursuant to Section 816.133. . . ." 30 C.F.R. § 807.12(e)(3). This was subsequently amended to provide that Phase III would be completed when the permittee "has completed all. . . reclamation operations in accordance with the approved reclamation plan so the land is capable of supporting any postmining land use approved pursuant to 30 CFR 816.133. . . ." [45 Fed. Reg. 52324 (1980).] However, as noted above, the revegetation requirements which must be accomplished during the period of liability [five or ten years] are such that a required use exists during the reclamation period, which makes the amendment as to Phase III of no moment because an actual use is still required.

[17] This is expressly set forth in §§ 101(b), 102(c), (k), 515(b)(12) and 522.

[18] At the hearings on the Act it was stated on behalf of the Environmental Policy Center, *amicus* herein:

> The abolitionists have a long history behind them to convince even the optomistic [sic] that a strong law will not eliminate the damages and suffering because tough laws have been past

(con't)

All the above provisions are unrelated to the control of pollution, which further supports the conclusion that the land use control and planning results of these provisions are not merely "incidental," as the Secretary contends. This conclusion is compelled when it is considered that the Act, in numerous other provisions,[19] contains requirements clearly directed at water pollution control. The Secretary does not contest this except with respect to the topsoil provision.

[sic] before but have not been enforced. For them, only abolition will solve the problems and put an end to the destruction.

I see the need for a phase-out from their perspective but I see the need for a phase-out from a National coal policy perspective also. It may sound incongruous, to suggest a coal policy based on legislation what [sic] would preclude the mining of 55% of our present coal production. . . .

* * *

This legislation, with a phase-out of surface mining over a realistic time period, can be the important step forward as we begin to use our coal reserves. . . . [*Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs, House of Representatives,* 95th Cong., lst Sess., Part IV 390, 395-96 (1977) (hereinafter *"House Hearings on H.R. 2"*).]

[19] See Findings No. 7, 8, 9, Conclusion No. 2, JS App. 16a-18a. Those provisions are §§ 515(b)(4), (8), (10), (11), (14), (16) and (19). On the basis of these provisions, the regulations promulgated by the Secretary require the use of sediment ponds and treatment ponds to control the four identified water pollutants—iron, manganese, suspended solids and acidity (pH), which are not controlled by any of the provisions challenged by appellees, and that surface drainage from non-point sources be controlled through reclamation and bond release. All of the foregoing requirements are in addition to or maybe even duplicitous of the control of point sources under the national pollutant discharge elimination standards of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* Finding No. 7, JS App. 16a. See *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979).

II. THE CHALLENGED PROVISIONS ARE CONTRARY TO THE TENTH AMENDMENT

Contrary to the impression conveyed by the Secretary, appellees are not ogres of recidivism seeking to overrule and sweep aside fifty years of precedent and federal regulatory legislation. The Secretary creates this impression by recasting appellees' contention to be that the regulation of surface mining is an integral State governmental function [Va. Br. 32], or by recasting appellees' arguments to be that this Court has held that "the federal government may not regulate private activities that affect interstate commerce if such regulation has any effect on land use,"[20] and by similarly recasting the District Court's holding [Ind. Br. 21-22].[21] These are neither appellees' assertions nor the District Court's holding.

The District Court correctly perceived that the *specific provisions* challenged are not merely incidentally concerned with land use control and planning, but rather have as their major, if not sole, purpose Federal land use control and planning [see Part I *supra*], and correctly reasoned that "[l]and use control and planning is a

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[20] Appellees do not assert that land use control and planning *under all circumstances and situations* is reserved exclusively to State and local governments. A national emergency may require some action which may result in some type of Federal land use control. *See, e.g., Fry v. United States,* 421 U.S. 542 (1975); *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958). However, this is not the issue now before the Court.

[21] The issue is not whether Congress can regulate interstate commerce "if such regulation has any effect on land use." [Ind. Br. 22.] Obviously any provision regarding environmental protection has some effect on land use; however, that is not being challenged. The issue is whether the Federal Government may impose land use decisions, as well as governmental structures, criteria and procedures for such decisions upon State and local governments based on the Federal Government's determination of the highest and best use of certain types of land, or whether it can directly usurp such decision making and implement Federal governmental structures and procedures.

traditional or integral governmental function or area of State sovereignty,"[22] essential to the separate and independent existence of the States. *National League of Cities* established that the very nature of the Federal system imposes certain restraints on the Federal Government's plenary power under the Commerce Clause which had been recognized as to other powers.[23] Even though an act of

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[22] Conclusion No. 3, JS App. 28a. Obviously, this is a new question of law for this Court to determine under its ultimate judicial review authority. The cases of this Court cited by the Secretary [*Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942)] did not involve the question presented in the case at bar and are so easily distinguishable as to deserve no further comment. Also, the matters involved in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), and *United States v. California*, 297 U.S. 175 (1936), are in no way similar to land use planning and control. The lower court cases cited by the Secretary also have no applicability. *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), was decided before *National League of Cities v. Usery*, 426 U.S. 833 (1976), and involved potential interstate spill-over effects of air pollution. *United States v. Helsley*, 615 F.2d 784 (9th Cir. 1979), did not involve land use planning and control but merely concerned safety in air traffic which has historically been treated specially by this Court.

[23] *National League of Cities v. Usery*, 426 U.S. 833 (1976), of course, was not this Court's first expression of concern for the limits imposed by Federalism. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978). The real question, as postured by Professor Tribe, is:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions- in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

National League of Cities answered the inquiry in the affirmative, just as the Court has in other areas. *See United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Moreover, Justice Rehnquist recognized that "important decisions of constitutional law are not subject to the same command of stare decisis as are decisions of statutory questions. Surely there can be no more fundamental constitutional question

(con't)

Congress may be within the scope of the Commerce Clause, Congress may not exercise this authority in a manner so as to impair attributes of sovereignty attaching to every State Government, particularly integral governmental functions essential to the separate and independent existence of the States [426 U.S. at 845].

Obviously, the Secretary would like to limit *National League* to only holding that the Federal Government may not dictate the wages which a State must pay its employees. However, *National League* is but a part of the evolution of the "limits imposed by federalism," which evolution must take place "just as our understanding of Congress' power under the Commerce Clause has evolved."[24] Anything short of such balanced evolution will eventually leave but a national constitution, as opposed to the "compoundly federal and national constitution" as intended and actually structured by the Framers.[25]

If the Commerce Clause has evolved to the extent of reaching local activities which affect commerce "even in the minutest degree",[26] then Congress quite obviously can extend its powers into areas "never intended"[27] or

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than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments," *Fry v. United States,* 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting), and suggested that *Maryland v. Wirtz,* 392 U.S. 183 (1968), be overruled, as it subsequently was in *National League of Cities.*

[24] *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). It may be that "experience" and not "logic" or even political philosophy is at the base of the evolution of Federalism principles. *California v. United States,* 438 U.S. 645, 646 (1978).

[25] Diamond, *Commentaries on The Federalist,* 86 YALE L.J. 1273, 1282-83 (1977).

[26] *Maryland v. Wirtz,* 392 U.S. 183, 204 (1968) (Douglas, J., dissenting), *overruled, National League of Cities v. Usery,* 426 U.S. 833 (1976).

[27] As but one example—if the postmining land use of prime farmland can be restricted by Congress to farming, effectively (con't)

contemplated by the Framers of the Constitution[28] contrary to the implicit Federalism concepts. The necessity for the concomitant evolution of the limits imposed by Federalism on the Commerce Clause power as it affects the attributes of sovereignty of the States, is self-evident.

National League and the Federalism principles implicit in the Constitution demand a two-fold inquiry. First, is the affected area an integral governmental function traditionally performed by State and local governments essential to the separate and independent existence of the States? Second, do the challenged provisions act on the States as States? These inquiries at some point blend and in the case at bar encompass at least two very fundamental questions as what is a "State" and what is land use control and planning, both of which must be viewed in light of the delicate State-Federal structure implicit within the Constitution as well as the history and "experience" of land use planning and control.

(A) **Land Use Planning And Control Is An Attribute Of State Sovereignty.** Land use planning and control is an attribute of sovereignty necessary to the separate and independent existence of the States because (l) it

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prohibiting any other use, including non-commercial uses [based on a negligible effect on interstate commerce], the Commerce Clause has been extended to reach local non-commercial activity, both public and private. Based on the asserted yearly change in use of one million acres of land from agricultural production, of which 98% is due to urbanization and water needs and only 2% is due to surface coal mining [the yearly wasted agricultural productivity through the Agricultural Stabilization Program is *200 times more than* this amount of prime farmland affected by surface mining], the Federal Government seeks to mandate land use planning and control on mined prime farmland. Assuming this to be a substantial adverse effect on interstate commerce supporting the purported exercise of the Commerce Clause power, then the Federal Government can enact land use planning and control over the remaining 98% of converted prime farmland. This will propel the Federal Government into the heart of urban and water resource land use planning and control— directly into non-commercial State and private activity.

[28] Friendly, *Federalism: A Foreword,* 86 Yale L.J. 1019 (1977). See also *Perez v. United States,* 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

encompasses the process of evaluating, establishing and zoning wholly intrastate non-commercial State and private activity, as well as commercial activity, in order to effectuate the desired nature of and the quality of life in local communities, which is not the private business activity differentiated in *National League;* (2) it cannot be viewed in a single dimension as an exercise of the police power; rather land use planning is a hybrid governmental service by which States and local communities define and effectuate the nature and quality of their existence as well as governmental fiscal structure; (3) Federalism principles involve concepts of local self-determination and accountability essential to the determination of the nature of and quality of the existence for local communities and their people; (4) land use planning and control is in fact the manifestation of a physical quality of a State in that it is a State's use of its lands, that is—an assertion of a State's quasi-real property interest in the land within its borders; and (5) the presumed local benefit-burden resulting from land use planning and control or the "average reciprocity of advantage" becomes nonexistent if exercised by the Federal Government under the Commerce Clause and would raise serious Fifth Amendment questions.

The Secretary attempts to view and define land use planning and control solely in terms of being an exercise of the police power in order to bring it within "the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of. . . the Nation and of the State" and therefore federal preemption,[29] as differentiated in *National League,* 426 U.S. at 845. However, land use planning and control involves evaluating, establishing and zoning intrastate non-

[29] *See United States v. Darby,* 312 U.S. 100, 124 (1941); *Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 (1919).

commercial State and private activity,[30] as well as commercial activity, in order to effectuate policies (which transcend mere economics) as to the overall nature of and quality of life in local communities. Land use planning is not an area of individual business activity as differentiated in *National League.*

Most State government functions can be viewed solely as an exercise of the police power. However, *National League* demands a multi-dimensional analysis in determining sovereign functions necessary to the separate and independent existence of the States, beyond the single dimension of power source analysis—that is, labeling land use planning as merely an exercise of the police power. Otherwise, a State would be nothing more than a "gutted shell"— a capitol building with employees but without any sphere of governance except as federally dictated. A "State" is more than the location of its capitol; it also includes integral governmental functions such as fire prevention, police protection, sanitation, public health, parks and recreation, as well as hospitals and schools. These functions are established and controlled through the exercise of a State's police power. However, *National League* found that these governmental services transcend being characterized or

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[30] No Commerce Clause case has involved even remotely similar far-reaching impacts on intrastate private and State non-commercial activity as presented by direct Federal land use planning and control [see note 27 *supra*]. Many cite *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing the Commerce Clause power to reach the personal consumption of wheat. Such is a gross distortion. A person growing wheat in his backyard only for personal consumption, no part of which was to be sold in commerce, was not subject to the Agricultural Adjustment Act [the penalties provided and the denial of a market card applied only to a farmer who sold wheat, 317 U.S. at 113-17]. However, Federal land use planning as in the case at bar prohibits wholly intrastate private and State non-commercial activity, even though a State or local community would benefit from other uses, *i.e.*, the quality of life in and the nature of local communities.

viewed merely as exercises of police power; rather, they rise to the level of being attributes of State sovereignty. So it is with land use planning and control—a hybrid of such governmental functions or services and a State's regulation of purely local non-commercial activities on its lands. Even those who would take *National League* into areas far removed from this Court's analysis acknowledge the special place of land use planning and control to the States' separate and independent existence, as well as the necessity of some sphere of State governance.[31]

The essence ("experience") of land use planning and control, which transcends being characterized solely in terms of a power source, is—the States and their local communities, by the means of land use planning and control, define and effectuate that intangible, almost indefinable, but recognizable quality of life within a given community or even a limited area within a community— including whether it will provide "open space" and limit population density,[32] whether it will grow or limit its expansion,[33] whether it will encourage industrial development (or even prohibit surface coal mining as was done by Vanderburgh County in the heart of the coal area in southwestern Indiana),[34] whether it

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[31] Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 YALE L.J. 1196, 1232, 1266 n.235 (1977). Most authorities would agree that "Congress cannot deny the States some symbolic corollaries of independent status, some revenue with which to operate, *some sphere of autonomous law making competence* and *some measure of choice in selecting a political structure.*" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978) (emphasis added). See also *Developments in the Law — Zoning,* 91 HARV. L. REV. 1427, 1618-24 (1978).

[32] *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106 (1980).

[33] *Construction Industry Association of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

[34] *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). Vanderburgh County, Indiana, by a zoning ordinance enacted in 1976 [Vanderburgh County Ordinance Book p. 87 (1976)], (con't)

will seek to preserve historical and natural advantages,[35] whether there will be agricultural development as opposed to industrial development,[36] or even whether it will be "[a] quiet place where yards are wide, people few, and motor vehicles restricted. . . ."[37] These decisions are based upon such considerations as the location and availability of fire, water and sewage service to given areas, potential depletion of local resources, availability or lack of availability of other suitable lands, meeting the community's growth demands, avoiding "strip" communities, protecting the public health by appropriately zoning incompatible uses, providing recreational opportunities for its citizens, and providing a sufficient tax base to support local governmental services.

Furthermore, it is through land use control that many of the other integral governmental functions traditionally performed by State and local governments and recognized in *National League* are accomplished. Land use regulation is used to control development, minimize fire dangers, maximize fire fighting potential, ensure adequate sanitation facilities for the public health, and provide sufficient open

prohibits surface coal mining. Vanderburgh County is south of Pike County and adjacent to Warrick County [JA 65], the largest coal producing counties in the State [JA 83-84], and in fact, has surface mining at its borders [JA 65]. Warrick County obtains 50% of its tax revenues from the coal industry [Pl. Ex. 15-18; R. 498-503; Tr. 67-68]. The citizens of Vanderburgh County (Evansville, the largest city in southwestern Indiana, is located in Vanderburgh County, which is densely populated and highly industrialized) have decided to forego the tax revenues that they could otherwise receive from surface coal mining. However, with the advent of § 522, now the citizens of Vanderburgh County, and other similar counties, through their elected or local officials, will not be able to make such decisions. Rather, a State administrative body or the Federal Government will make such decisions.

[35] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[36] *Goffinet v. Christian County*, 65 Ill.2d 40, 357 N.E.2d 442 (1976).

[37] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

spaces, parks and recreational facilities.

Land use planning and control is integral to the local governmental financial structure and stability necessary to the delivery of those essential governmental services recognized in *National League*. In fact, most of the school systems throughout the States are financed directly by and their quality is dependent on real and personal property tax revenues, *e.g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 10 (1973). Local communities utilize land use planning concepts interrelated with property taxes to encourage or discourage various uses of property, and to enhance the financial stability of the governmental unit so as to be able to make and effectuate policy decisions in these governmental service areas. See Currier, *Exploring the Role of Taxation in the Land Use Planning Process,* 51 IND. L.J. 27 (1975). Illustrative of this are the disastrous consequences to the six southwestern Indiana counties of the federally dictated land use control and planning concepts involved in the case at bar.[38]

This essence and "experience" of land use planning and control embodies elements of Federalism as local self-determination and accountability. As recognized by this Court: "[z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities." *Warth v. Seldin,* 422 U.S. 490, 508 n.18 (1975). These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[39]

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[38] See pp. 33-34 *infra* and note 6 *supra.*

[39] [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . . Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial developments shall cease at its boundaries, but that the course of such developments shall proceed within definitely fixed lines. [*Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 389 (1926).]

and are essential because of the very diverse geography, geology and climate among the States which "have all but necessitated the recognition of legal distinctions corresponding to these differences," including principles of Federalism. *California v. United States,* 438 U.S. 645, 648 (1978).[40] In fact, "[p]reservation of local control, naturally enough, involves protecting the integrity of state and local governments." *City of Rome v. United States,* ___ U.S. ___, 64 L.Ed.2d 119, 155 n.12 (1980) (Powell, J., dissenting). To remove the hybrid governmental service of land use planning and control from those affected and concerned is to allow rule by those whose existence and destiny and, therefore, perspective is totally removed from the consequences without accountability to those affected. It would cut to the core of principles of Federalism.

Land use control and planning is in fact a State's use of its land based on a quasi-property interest which is a part of the "States as States." Land within a State's boundaries is a part of the State and, accordingly, the State's relationship to its lands has been accorded special treatment.[41] More important, land within a State's boundaries is subject to public or State use in the form of a servitude by which the State can restrict the owner's right to use the property for the benefit of the State and its citizens without a "taking" occurring, in part because of the presumed local benefit-burden resulting from land use planning and control.[42] For the Federal Government to regulate this State use of land and its property interest is to regulate the "States as States."

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[40] Indeed, Congress recognized this very aspect in § 101(f) of the Act, except that in the instance of land use planning and control, Congress ignored it.

[41] "It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders." *Kansas v. Colorado,* 206 U.S. 46, 93 (1907).

[42] See *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106, 113 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 134-35 (1978).

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of Federalism is the Fifth Amendment protection afforded property rights which cannot be "taken for public use, without just compensation." It is the existence of a public benefit in which the landowner shares, or to use Chief Justice Holmes' phrase, there is "an average reciprocity of advantage," which in part justifies placing burdens upon the use of the land without compensation being required.[43] This local benefit-burden emphasizes the elements of self-determination and accountability within Federalism concepts. To allow the Federal Government under the Commerce Clause to dictate land use control and planning concepts based on "substantial and adverse effects" on commerce would either remove totally or so dilute the local benefit to landowners and leave only the burden, as to impinge directly upon Fifth Amendment rights.

This hybrid governmental service of land use planning and control through a State's use of its lands for the benefit of its citizens in today's urbanized society is one of the most essential attributes of sovereignty possessed by the State of Indiana and its political subdivisions and is protected by the Constitution.

(B) The Act Coerces The States. Quite to the contrary of the Secretary's assertions that the Act only "encourages"

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[43] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (where there was no such reciprocity). See also note 42 *supra.* If the benefit to the public generally is clear and distinct, land use regulations have been upheld despite severe financial impact on the landowner's property. *See Penn Central Transportation Co., supra,* where the Court divided over whether the "average reciprocity of advantage" to the landowner was sufficient to justify the extent of the restriction in upholding the New York law. The majority opinion found sufficient benefit enuring to the City generally and to the landowners as a part of that City [438 U.S. at 134-35].

and does not "require" the States "to enforce the Act" [Va. Br. 31], the challenged provisions operate directly on the States through §§ 503 and 504 to compel the States by threatened Federal usurpation not merely to enforce the Act, but to exercise their legislative and executive powers as dictated by Congress.[44] This "choice" is not a "carrot and stick" inducement enacted pursuant to the spending power [Art. I, § 8, cl. 1], the propriety of which was specifically left open in *National League of Cities,* 426 U.S. at 852 n.17. In these situations the States may choose not to enact laws on pain of not receiving Federal funds,[45] which is far different than the "stick" being Federal usurpation, as in the case at bar. Since the Federal Government has no power to directly impose these land use policies as under the prime farmland provisions or to assume the role as decision-maker under the procedure for zoning lands unsuitable for surface coal mining [§ 522] and other challenged provisions, that a State "chooses" to adopt these provisions in a State Program to avoid Federal usurpation is irrelevant. To state that such is a "choice" is a perversion of the word, and the General Assembly of Indiana so found [see note 3 *supra* and Appendix C *infra*].

These propositions flow directly from *National League of Cities,* where the Federal Government did not directly mandate or control State policies in the areas of fire protection, police protection, sanitation, parks, recreation, schools and hospitals. Yet the *indirect* infringement (by wage mandates) on State policies concerning these governmental services traditionally delivered by the States was held to be contrary to the Tenth Amendment and other Federalism concepts implicit in the Constitution. Had the

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[44] See notes 2 & 3 *supra;* Part I (A) *supra.*

[45] *E.g., Texas Landowners Rights Ass'n v. Harris,* 453 F. Supp. 1025 (D.D.C. 1978), *aff'd,* 598 F.2d 311 (D.C. Cir.), *cert. denied,* 444 U.S. 927 (1979); *North Carolina v. Califano,* 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd,* 435 U.S. 962 (1978).

Federal Government directly usurped the State governmental services, or directly mandated that the States perform these governmental services pursuant to dictated policies by threatened usurpation, there can be no doubt that the transgression of Tenth Amendment and Federalism concepts would have been even more severe.

This is also required by *Charles C. Steward Machine Co. v. Davis,* 301 U.S. 548 (1936), since Federal statutes are void "as involving the coercion of States in contravention of the Tenth Amendment", if two propositions are "made out by the assailant":

> There must be a showing in the first place that separated from the credit [as applicable to the case at bar, the required State Program] the revenue provisions [as applicable to the case at bar, a Federal Program directly usurping the State functions] are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are *weapons of coercion, destroying or impairing the autonomy* of the States. [301 U.S. at 586; emphasis added.]

In the case at bar, as to the first "showing," the Federal Government cannot do the latter; consequently, the former is equally unlawful. The second "showing" (weapons of coercion) is a *per se* result of the first.

(C) **The State Interests Are Paramount To The Federal Interests.** Appellees do not contend that being an integral function of State and local governments makes land use planning and regulation totally immune from Federal control under all circumstances. Exigencies of national scope may demand broad, swift action that may impinge on State sovereignty [*National League,* 426 U.S. at 853, 856 (Blackmun, J., concurring)]. But this is neither the normal course, nor the situation at hand. Whether the Act's interference with this sovereignty is justified must turn on the factors set out in *National League,* which show that it is not.

The pollution control aspects of the Act were not challenged by appellees and remain intact. Thus, there are no interstate spill-over effects. Preservation of prime farmland in no way presents the pressing need of the wage freeze sustained in *Fry v. United States,* 421 U.S. 542 (1975). There is currently, and for the foreseeable future, no shortage of farmland. In fact, the Federal Government is paying to withhold vastly larger quantities of farmland from production than are affected each year by surface mining [see pp. 42-45 *infra*].

Unlike *Fry,* the challenged provisions were not carefully drafted to limit their interference with State sovereignty—in fact, they were drafted in perhaps the most intrusive manner possible. Other less intrusive and undoubtedly equally effective means of encouraging preservation of farmlands are available to the Federal Government, such as tax credits or penalties, adoption of policies relating to federally guaranteed or insured loans, or even prime farmland prohibitions in federal water, highway and other projects. The means here, however, make no pretense of being discrete. They dictate governmental structures, procedures and criteria for land use decisions and, in fact, some dictate specific land use.

If nothing else, Indiana could have been given the discretion to allow variances for other land uses in the case of the AOC and prime farmland provisions. In Indiana, no variances based on facilitating higher or better land uses was provided in the prime farmland, AOC and topsoil provisions, as were provided for mountaintops and steep slopes in the East. If Indiana refuses to enact laws and promulgate regulations as the Federal Government has dictated, the Federal Government will do so. There are no options, no alternatives, and no exceptions.

Contrary to the Secretary's assertions, this intrusion into State affairs is permanent and final. The challenged

provisions are not temporary measures as in *Fry*. Governmental structures and procedures for postmining land use, as well as actual land use are dictated, presumably forever, regardless of any need or change in circumstances facing the States and local governments.

While the prime farmland mandate is imposed upon a piece of property for more than a decade, the effect of the regulation undoubtedly will be beyond that. Everyone agrees that surface mining presents an ideal opportunity for a change in land use. However, after ten years and restoration of the surface to its prior condition and contour, the land may no longer be suited for a change in use. The opportune time to effectuate a change in land use will have passed, in some cases forever. The means or energy for conversion of the land will not be available ten years after the fact. In the meantime, other non-mined prime farmland may be converted to the uses for which mined prime farmlands could have been utilized.

The possible effects of the interference are evident. A community might well be in need of housing, recreational or water supply facilities for which the mined land would be ideally suited. On the other hand, such mined land may be best adaptable in a given community for specific municipal purposes, such as an airport or waste treatment facility. Nevertheless, such uses are forbidden.

The most drastic effects of these federally dictated land use policies on Indiana land use planning, even without regard to the federally dictated governmental structures and procedures, are that prime farmland as defined by the Secretary of Agriculture is not prime farmland based on Indiana's land use policies; that the highest and best postmining land use of prime farmland under Indiana land use concepts is not necessarily a farming use [see note 6 *supra*]; that surface coal mining land use is integrally related to the county government financial well-being in

southwestern Indiana to the extent that 50% of one county's total real and personal property tax revenue is derived from the land use of surface coal mining [Pl. Ex. 15-19; R. 498-503; Tr. 67-68]; and that the fulfillment of the energy needs of Indiana citizens is integrally related to the land use of surface coal mining [83% of the Indiana surface mined coal is purchased by Indiana utilities under long-term coal contracts, JA 72]. The result of the federally dictated land use policies will be to displace the surface coal mining land use in Indiana into underground coal mining land uses in Kentucky and Illinois.[46] The land use structures and benefits in Indiana noted above will be destroyed.

As in *National League of Cities,* the consequences of the Federal intrusion on this attribute of State sovereignty are in fact disastrous to the separate and independent existence of Indiana. The folly of Federal land use planning based on the myopic view of some is apparent.

III. THE CHALLENGED PROVISIONS EXCEED CONGRESS' POWER UNDER THE COMMERCE AND NECESSARY AND PROPER CLAUSES

The Secretary's argument on the Commerce Clause issues subtly changes constitutional precepts. Surface mining, like manufacturing, "is not of itself interstate commerce. . . ." *United States v. Darby,* 312 U.S. 100, 113 (1940). For such

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[46] [JA 148-52.] This land use policy was based on the nature and extent of coal reserves, as well as the relationship of such reserves to prime farmland, in Illinois. Indiana's coal reserves are not the same and for the most part are not mineable by the underground method [JA 77-80]. See note 6 *supra.*

The southwestern Indiana counties are heavily dependent on the land use of surface coal mining as a source of tax revenues and employment. The coal industry, in turn, draws other industry that provides additional employment and tax revenues, which would not locate there were it not for the coal industry. [See JA 76.]

intrastate activity to be subject to regulation under the Commerce Clause in conjunction with the Necessary and Proper Clause, the regulated facet of surface mining must have a "substantial and harmful" effect on interstate commerce,[47] not merely as the Secretary contends, that it must have only "some" effect on commerce, "be it great or small."[48] Indeed, this Court has recognized that Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[49]

The function of a court on a constitutional challenge is to determine whether Congress had a "rational basis" for finding that there was a substantial adverse effect on interstate commerce from each particular facet of the intrastate activity being regulated.

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[47] *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258, 272 (1964); *Katzenbach v. McClung,* 379 U.S. 294, 304 (1964); *Wickard v. Filburn,* 317 U.S. 111, 125 (1942).

[48] See Ind. Br. 11, 14. As to the Secretary's reliance on *NLRB v. Fainblatt,* 306 U.S. 601, 606 (1939), to support his challenge of the District Court's methodology of measuring qualitatively and quantitatively this effect based on the information before Congress, *Fainblatt* is merely exemplative of the class of activities test enunciated in *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942), where in citing to *Fainblatt* the Court noted that a single farmer's contribution "taken together with that of many others similarly situated, is far from trivial." This Court has always required that there be a "substantial" and "adverse" or harmful (not "trivial") impact on interstate commerce to support the regulation of intrastate activities. *Heart of Atlanta Motel, Inc., supra; Katzenbach, supra; Wickard, supra; Wirtz, supra.* Almost every decision of this Court in determining the prerequisite substantial and adverse effect on interstate commerce has considered "qualitative" as well as "quantative" effects on interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States, supra* at 253; *Perez v. United States,* 402 U.S. 146, 155-157 (1971). A quantitative judgment must be made by a court in exercising judicial review of whether Congress' exercise of power was within constitutional limits.

[49] *Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968), *overruled on other grounds, National League of Cities v. Usery,* 426 U.S. 833 (1976).

Katzenbach v. McClung, 379 U.S. 294 (1964). The judicial focus is on "whether the *particular activity* regulated or prohibited is within the reach of the federal power." *Darby, supra* at 120-21 (emphasis added).

Even if a rational basis is found, the inquiry is not complete. The focus under the Necessary and Proper Clause is whether the "means chosen" [the challenged provision of the Act] are "plainly adapted to the legitimate end" of alleviating an adverse effect on interstate commerce from the particular facet or activity regulated,[50] *i.e.,* a means/ends nexus test, not as the Secretary contends whether the means are "reasonable and rational" in the abstract [Va. Br. 24].

The Secretary contends that there are three independent bases under the Commerce Clause for the validity of the challenged provisions. Initially the Secretary asserts that since coal is a commodity sold in interstate commerce, Congress may regulate the "conditions under which that commodity is produced" [Ind. Br. 12, citing *Darby, supra*]. *Darby* did not hold that intrastate activities can be regulated absent a substantial adverse effect on commerce. *Darby* held that a provision of the Fair Labor Standards Act which prohibited the "shipment" in interstate commerce of goods produced under substandard labor wages was valid because "the shipment of manufactured goods interstate is such commerce" [312 U.S. at 113]. This is in no way analogous to

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[50] *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra; M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819). The fact that other, collateral results may be attained will not invalidate the regulation if, *and only if,* the regulation is otherwise valid, that is, adapted to removing the rationally found substantial adverse effect on interstate commerce. *See Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 163 (1942). Congress may not, "'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.'" *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 326 (1936), quoting *M'Culloch v. Maryland,* 17 U.S. at 423.

the challenged provisions of the Act in question since they go beyond controlling the use of instrumentalities of interstate commerce. Rather, in the case at bar this Court must review the challenged provisions under the substantial adverse effect test, as the Court did in *Darby* in reviewing the other challenged Fair Labor Standards Act provisions [312 U.S. at 119-20].

To the extent that the Secretary is relying [Ind. Br. 20] on the holding of *Darby* concerning industry's use of substandard labor conditions to gain a competitive advantage and cause "impairment or destruction" of competing local industry,[51] Congress had no rational basis for an analogous finding as to competition through reclamation cost variances because the coal industry in the

[51] Congress did not find in § 101(g) that there was a substantial adverse effect on interstate commerce by the impairment or destruction of competing coal companies in States with the most rigorous reclamation standards. Rather Congress found that such competition might "undermine the ability of the several States to. . . maintain adequate standards. . . ." This is not a substantial adverse effect on commerce, and it is not within *Darby*. The ability of a State to regulate is a governmental effect, not a commercial effect. The argument that unless all States have the same regulations of any industrial activity, then there is an adverse effect on commerce, would lay open the regulation of all local industry to Federal regulation, *i.e.*, the regulation of State regulators. Various systems of State taxation are for the specific purpose of attracting industry or land use planning. Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975). Extending *Darby* to hold that the use of these benefits is unfair competition would undermine the ability of States to regulate or tax, and would require uniform taxation and regulation by States.

Also, the Record belies such a finding. Pennsylvania and Ohio had stringent laws and a flourishing coal industry. Their ability to regulate was not impaired. See note 52 *infra*. Illinois also had stringent reclamation requirements, but several Senators did not want State "bureaucrats" to be able to allow farming use to change (which had nothing to do with the State's ability to regulate). Indiana had excellent reclamation laws without any pollution problems [JA 102-04], but did not have the prime farmland conflict present in Illinois [note 6 *supra*; Appendix C]. In other words, differing local conditions gave rise to differing State laws. See note 34 *supra*.

States with the most rigorous reclamation regulations was flourishing.[52]

More important, in *Darby* the Court found a rational basis to support the conclusion that the use of substandard labor costs resulted in the "destruction of local businesses" through competition. This is not analogous to varying reclamation costs in coal production. Coal is not a homogeneous commodity, nor is there any uniformity in production and reclamation conditions which could support such an assumption. In fact, costs of producing, reclaiming and transporting surface mined coal are site-specific and vary based upon the extremely diverse geological formations and nature of the coal and its location in relation to that of its users. Topsoil can vary throughout the United States from but a few inches to a few feet and overburden can vary from ten feet to over one hundred feet with coal seams ranging from a few feet thick to ninety feet thick, even within the same State, just as the slope of the terrain can similarly vary. Hence, the overburden to coal ratio can vary from 10':1' to 1':10', as can the coal recovery (tons) per acre ratio. The nature of the coal can be anthracite, bituminous, subbituminous or lignite with widely varying ash, moisture, fixed carbon and sulfur content, as well as heat producing

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[52] See *House Hearings on H.R. 2*, Part II 44-49, where Governor Shapp of Pennsylvania stated: "[E]ven though with tough State regulations, Pennsylvania's coal production is up and constantly rising. The number of coal mining jobs in Pennsylvania is increasing and so are the profits of coal mining companies in our State. . . . Our law has not hampered production, stifled profits, or cost jobs." [*Id.* at 44.] In fact, any differential cost was stated to be "a very slight one" [*Id.* at 49]. Similarly, Rep. Murphy of Pennsylvania stated, "But today strip mining in Pennsylvania is regulated, yet it is more profitable than ever, and coal is more plentiful than ever." [123 CONG. REC. 24426 (1977).] Also in Ohio, Rep. Regula noted that after Ohio enacted a stringent reclamation act, Ohio continued to "have increased mining." [123 CONG. REC. 24427 (1977).]

capacity [from 7,255 BTU/ton to 14,715 BTU/ton].[53] Necessarily, the reclamation costs per acre, ton or BTU similarly range. Hence, the final cost of production and reclamation per BTU will vary from mine site to mine site within a State and between States.

In fact, it is commonly accepted that a competitive coal market is far less than even a regional market.[54] The transportation costs [averaging 20% of the per ton cost, *Use of Coal, supra* note 53, at 85] inhibit selling coal over great distances [83% of Indiana coal is sold to Indiana utilities under long-term contracts, JA 72-75]. Furthermore, most coal is not sold on a "spot market." Nationally, the electric utility industry consumes over two-thirds of the coal produced, of which in 1977, 86% was sold under long-term coal contracts, most in excess of twenty years [*Use of Coal, supra* note 53, at 84]. Moreover, in 1977, 14.5% of the utility consumption was from their captive coal companies, which is projected to increase to 18.8% in 1985 [*Use of Coal, supra*

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[53] Office of Technology Assessment, Congress of the United States, *The Direct Use of Coal — Prospects and Problems of Production and Combustion* 57, 85 (1979) (hereinafter *"Use of Coal"*).

[54] The national concentration ratio understates meaningful concentration because coal does not have a national market. When coal production is divided into four regional markets, the concentration ratio for the top-four producers in 1977 were: Appalachia, 22.3 percent; Midwest, 65.1 percent; northern Plains, 37.7 percent, and Southwest 64.1 percent. West of the Appalachian fields, moderate to high concentration exists. Even regional markets can be deceptively large. For example, a single Appalachian market does not really exist— northern Appalachian coal is not sold in southern Appalachian markets; east Kentucky coal does not sell in the Northeast. Further, high-grade metallurgical coals do not compete against steam coals. Captive coal, moreover, does not generally compete against noncaptive coal. Similarly, 1977's 54 million tons of export coal— most of which was metallurgical— does not compete domestically, except when foreign demand slumps. A true assessment of concentration in the coal industry must disaggregate production data and look at concentration in much more precisely defined markets. [*Use of Coal, supra* note 53, at 117-18.]

note 53, at 112]. The long-term coal contracts are necessitated by the huge capital outlays necessary to open new mines which in turn require a life-of-the-mine purchaser. This capital outlay also contributes to the fact that 69% of the planned new capacity of coal production is attributable to but seven large companies [*Use of Coal, supra* note 53, at 118]. Moreover, boilers and furnaces are designed to burn specific coal and are not readily adaptable to even coal of the same type [*Use of Coal, supra* note 53, at 58]. Other user-oriented problems are presented by ambient air quality standards, new source performance standards and prevention of significant deterioration of air quality [which now encompass particulate matter, SO_2, NO_2, CO, hydrocarbons, and photochemical oxidants] under the various Federal air pollution acts and regulations. [*Use of Coal, supra* note 53, at 58, 161-80.]

All of the above factors severely restrict applying normal competition factors as supply, demand, and cost to the coal industry. Hence, establishing a minimum wage so as to level competitive advantages based on varying labor costs cannot be translated to surface coal mining competition and reclamation costs. To make such an assertion as the Secretary does, is to attempt a simplistic, glib, superficial, and wholly misplaced analogy. It provides no basis for the constitutionality of the sections challenged.[55]

The second rationale by which the Secretary seeks to justify the challenged provisions of the Act is by the generalized assertion that coal mining operations significantly and adversely affect "commerce in agricultural products and other commodities" and that the challenged provisions are a means reasonably and plainly adapted to

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[55] There is no conceivable way these contentions support the areas unsuitable provisions [§ 522] or the requirement of pre-permitting approval of postmining land use changes.

removing such substantial and adverse effects.[56] Presumably the Secretary is referring to the finding that surface mining operations adversely affect commerce "by destroying or *diminishing the utility of land* for commercial, industrial, residential, recreational, agricultural, and forestry purposes. . ." [§ 101(c) (emphasis added)]. But he fails to articulate the nature of the burden on interstate commerce that is being alleviated other than general references to the preservation of productive capacity or utility, and, instead, urges blind deference to Congress' rhetoric. Apparently the judgment is that if land is surface mined, the land use or utilization of the land may be changed, not that the affected lands would have no postmining utility. There was no rational basis for Congress to believe that surface mining in 1977, or for several years prior thereto, resulted in the destruction of the utility of surface mined land. Of the 28 States producing coal in 1976, all had laws requiring restoration of surface mined land to a productive utility.[57] The specific sections challenged were only enacted because Congress made a land use judgment that certain utilities of land are equal or better than others, and, therefore, dictated specific non-variable land use provisions. The prime farmland, AOC and topsoil provisions implement specific, non-variable Federal judgments on what is the best use of land. In order to be a "means reasonably and plainly adapted" to alleviating a substantial adverse effect on commerce, there must be a rational basis to

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[56] Again the Secretary is presumably making a generalized contention to support each of the challenged provisions. However, again it is inconceivable to apply those contentions to support the areas unsuitable provisions [§ 522].

[57] All State laws required backfilling, grading, and revegetation long before the Act. See *House Hearings on H.R. 2*, Part IV 262-372; H.R. REP. No. 95-218, 95th Cong., lst Sess. 76 (1977); Appendix C hereto; *Final Environmental Statement, Permanent Regulatory Program Implementing Section 501(b)*, U.S. Dept. of the Interior, OSM-EIS-1 pp. BII-17 through BII-29 (1979).

support that a specific change in land use results in such an effect on commerce. Congress had no rational basis for determining that a change in use to or from forestry, or agriculture, or industry, or recreation, or commercial uses as opposed to each other, has a substantial adverse effect on interstate commerce.

The only instance where the Secretary contends a specific change in a postmining land use would have a substantial and adverse effect on interstate commerce is in the prime farmland provisions,[58] where the Secretary asserts that the District Court limited its review to a single set of statistics set forth in the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands* (1977) [hereinafter "Task Force Report"], which was submitted to the House Committee on Interior and Insular Affairs [JA 51-64]. Not only was it the only information before Congress, it was the only information available.[59] No matter how the Secretary

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[58] Apparently the Secretary, recognizing the weakness of his position on prime farmland, has decided to subtly change the required substantial adverse effect test. [See note 48 *supra.*] While the Secretary also asserts generally that the prime farmland provisions are a means to eliminate erosion, landslides, floods, and water pollution, such an assertion is absurd. See discussion pp. 7-10 *supra.*

[59] This is made clear by the history of the Act before the Senate. Originally as passed by the Senate, the Act contained a moritorium on mining on prime farmland [§ 410(d)], and in view of the lack of information concerning the effect on agriculture of mining on prime farmland by § 410(d)(4), the Secretary of Agriculture was directed to "commence such research, experimentation, and studies as are necessary to determine the impact of surface mining operations on agricultural production. . . ." [123 CONG. REC. 15787 (1977).] If there was any other information available, the Senate would not have required the investigation by the Secretary of Agriculture. When the Senate discovered the Task Force Report, the required studies provision was dropped in the Committee of Conference. [H.R. REP. (CONF. REP.) No. 95-493, 95th Cong., 1st Sess. 105 (1977).]

Also the prime farmland provisions were not involved in the Secretary's description of Congress' "painstaking review of the available data gathered. . . during several years of intense

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Secretary twists, limits and contorts the history of the Act on prime farmland, it remains that the Task Force Report was the only means by which Congress could form a judgment as to the nature of any impact, and the House Committee through the House Report concluded[60] that the "data" demonstrated an insufficient or trivial impact on interstate commerce from the effect of surface coal mining on prime farmland, and rightfully so.[61]

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legislative endeavor." [Ind. Br. 13.] The prime farmland provisions were not in any of the previously proposed legislation and, in fact, in the 95th Congress, the majority of the prime farmland provisions were not in the proposed House or Senate bill. Hence, the Secretary's assertions as to the timing of the Task Force Report versus the hearings and the Report of the House Committee as being at the tail end of "several years of intensive legislative endeavor" [Ind. Br. 13] is not true.

[60] "Furthermore, data contained in the Report of the Interagency Task Force on the Issue of a Moritorium or Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moritorium is not justified." [H.R. REP. No. 95-218, 95th Cong., lst Sess. 185 (1977)].

[61] The Task Force Report included the results of a 1975 study conducted by the Soil Conservation Service which found that the Nation contains a total of 384,000,000 acres of prime farmland of which 65% was used for crop land with approximately 134,000,000 acres of prime farmland not in crop land use [JA 53-55]. Further studies were conducted based on the annual production of coal which demonstrated that only 21,800 acres of prime farmland are disturbed by surface mining each year, which constitutes only 0.006% of the total prime farmland in the United States [JA 61]. Thus, it would take 166 years for surface mining to disturb even 1% of the total prime farmland in the Nation. The Report concluded that even if all prime farmland affected by surface mining in 1977 came entirely out of corn production, the annual effect based on the 1976/77 crop year would have been less than 0.04 percent [JA 62]. This is based on a class of activities analysis not just upon the effect in Indiana.

What the Secretary would consider irrelevant, most would consider irrational, as should this Court, that is— at the same time, the Federal Government through the Agricultural Stabilization and Conservation Service is paying farmers *not* to grow crops on 5,900,000 acres, which is 200 times the amount of prime farmland disturbed annually by surface coal mining. [JA 95-97.] Clearly, such a *de minimis* effect is not a substantial adverse effect as required by this Court, but is a trivial impact which is not sufficient.

The Secretary alludes to the fact that the Task Force Report indicated "that the total prime farmland acreage that might be affected by surface coal mining is approximately 7,000,000 acres" [Ind. Br. 15]. That figure was merely the extent of prime farmland overlying surface mineable coal, and it would take in excess of 300 years to affect the 7,000,000 acres of prime farmland. Finally, the Secretary alludes to hearing testimony of a zoning administrator of Knox County, Illinois, who supposedly "graphically described the losses in agricultural productivity . . . in his county." [*Id.*] However, try as one might, even the most vivid imagination cannot put together anything from Mr. Masterson's testimony concerning one county in one State [which is not true in Indiana, see note 6 *supra*] to counter the trivial impact on interstate commerce demonstrated by the Task Force Report.

The Secretary also cites to the remarks of Senators Humphrey and Stevenson. These remarks are but personal opinions which were later disproved by the "data" in the Task Force Report [see note 62 *infra*]. Moreover, the Senators' interest was not as to a substantial adverse effect on interstate commerce, but was directed to displeasure with the land use planning policies being exercised by administrators in the State of Illinois which already had a rigorous reclamation act.[62] Further, the misguided national land use policy for all the States, in turn, was based on the assumption by some that since Illinois had sufficient underground mineable reserves so that a land use policy giving preferential treatment to underground mining and agricultural uses as opposed to surface mining use was valid,

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[62] See the remarks of Senator Stevenson, note 8 *supra*. Again, this is a land use concept, but neither Senator was speaking about land use conversion as being a substantial adverse impact on agricultural production.

and that such was the case in all other States.[63]

The naked citations to the Congressional Record, while on their face impressive, once read do nothing to detract from the Task Force Report's conclusion as to the trivial impact on interstate commerce. The prime farmland provisions cannot pass the requisite constitutional tests under the Commerce Clause and Necessary and Proper Clause.

The third basis the Secretary asserts to support the challenged provisions is that they prevent environmental harm and protect life and property. With respect to the AOC provision, the Secretary contends that it is designed "to avoid continuing harm" caused by "unreclaimed mining cuts." But since all coal mining States required reclamation, there was no rational basis for Congress to believe that such was the situation in 1977 or had been for years prior thereto.[64]

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[63] The Task Force Report indicated that the prime farmland provisions were in fact based on two studies done in Illinois which reached the conclusion that since the deep mineable reserves in Illinois are more than plentiful, there was no need to surface mine coal. [See JA 52.] Of course, this conclusion for land use policies in other States is unsupportable and disastrous. See notes 6 & 46 *supra.*

[64] See note 57 *supra.* The Secretary's citation [Ind. Br. 18 n.11] is not to the contrary. The 1.9 million acres of unreclaimed land referenced in *House Hearings on H.R. 2,* Part II 69, was to land which had not been reclaimed both by surface coal mining and other types of mineral surface mining *in the past,* that is, prior to the State acts. The representative of the Corps of Engineers was not referring to such occurring under present State laws and regulations. [*See id.* at 77, 82, 85, 91.] In further support of the above statement the Secretary also references S. REP. No. 95-128, 95th Cong., lst Sess. 60, 83 (1977), and H.R. REP. No. 95-218, 95th Cong., lst Sess. 78, 80, 93 (1977). A reading of these reports indicates that all of the original contour problems were with reference to the steep slope and mountaintop areas of the eastern United States. For instance, the House Report cited states:

> In the humid East, retention of overburden material on the bench, avoiding all unnecessary placement of the unconsolidated material on steep slopes would contribute most significantly to the elimination of slides, sedimentation

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The Secretary also argues that the AOC and the topsoil provisions are necessary to prevent water pollution [Ind. Br. 18 n.11] by preventing erosion and sedimentation. Obviously, the cited comment of the U.S. Army Corps of Engineers relates only to topsoil, not to AOC. As to topsoil and erosion, the Act contains specific requirements for preventing erosion which require the operator to control erosion and sedimentation until the bond is released.[65] In other words, the Act contains independent requirements controlling the goal the Secretary asserts for the topsoil requirement, making it clear that the topsoil requirement is not directed at water pollution control.

With respect to the pre-permit approval of postmining land uses, the Secretary seems to contend that this requirement is necessary to ensure that the operator has the "technological capability to restore the land." How this is

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siltation and other offsite effects which threatened downstream areas. The basic concept embodying this principle is returning the mining site to its approximate original contour.

Approximate original contour is equally valid when applied to midwestern and western coal surface mining, inasmuch as the concept also includes the idea of blending the site into the surrounding terrain to the greatest degree possible. . . . [H.R. REP. No. 95-218 at 80.]

These concepts have no applicability to the Midwest—for instance, Indiana has no steep slopes and did not have a pollution problem [see Appendix C hereto]. Where the reason for the AOC provision is based on problems not present in Indiana, and yet the AOC is even more rigid in Indiana, it cannot be said that the AOC as applicable in Indiana is plainly adapted to removing the problems which did not even exist in Indiana.

[65] For instance, in § 515(b)(10) operators are required to control "quality and quantity of water. . . during reclamation" including preventing "additional contributions of suspended solids to streamflow, or runoff outside the permit area" [(B)(i)], and to construct siltation structures [(B)(ii)]. Furthermore, pursuant to § 515(b)(19), revegetation is independently required and pursuant to § 519(c)(2) the bond cannot be released if the surface mined lands are "contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by Section 515(b)(10) . . . ."

related to the requirement that any changes in postmining land use must be approved by the regulatory authority is difficult to comprehend. Again, the relevance of a change in a particular land use to any adverse effect on interstate commerce is nonexistent.[66]

It remains that the challenged provisions are not means reasonably and plainly adapted to removing significant adverse effects on interstate commerce and, therefore, are beyond the Commerce Clause power.

IV. THE PRIME FARMLAND AND AOC PROVISIONS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT

The substantive due process issue raised by the AOC and prime farmland requirements is two-fold: Whether the

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[66] The Secretary argues that § 522(e)(4) and (5) is reasonably and plainly adapted to "ensuring that the extraction of coal does not endanger life and property" (emphasis added). But it is not so limited. By the broad definition of "surface coal mining operations," innocuous activity as storage facilities or parking of vehicles is prohibited. There was no evidence before Congress that persons or property were endangered by activities as driving or parking of vehicles, or the loading of coal or supplies. Section 522(e) is not reasonably and plainly adapted to removing the burden on interstate commerce from any dangers to life or property from surface coal mining operations.

As to § 522(a), (c) and (d), the Secretary makes absolutely no analysis of how zoning an area unsuitable for mining purposes is based upon such an end. This Court should, in an equally cursory manner, dismiss such a contention. The requirements of § 522(a)(3) whereby States must establish procedures that allow lands to be zoned unsuitable for surface mining if damage might result to "historic, cultural [or] esthetic values" is so unrelated to interstate commerce that no more need be said.

discriminatory treatment[67] of mine operators and States in the Midwest violates the equal protection aspects of the Fifth Amendment;[68] and second, whether the foregoing provisions are arbitrary and capricious in violation of the due process guarantees of the Fifth Amendment.[69]

As to the equal protection aspects, the Secretary quarrels with the standard of review invoked by the District Court, set forth in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976)—that the discrimination must be justified by an overriding national interest. The Secretary argues that the appropriate standard of review is that the discriminatory treatment must merely be rationally related to a legitimate purpose [Ind. Br. 28]. However, the only possible legitimate purpose for the discriminatory treatment in the case at bar is the alleviation of substantial adverse effects on interstate commerce. If this is not an overriding national interest, then the effect cannot be substantial and adverse. Hence, the Secretary's differentiation under close analysis is a distinction without any basis.

The Secretary seeks to hide behind a "presumption of rationality" which there may be in other areas. However, when regulation of intrastate activities under the Commerce Clause power is at stake, there is no such presumption. The means must be reasonably and plainly adapted to the

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[67] The discrimination in the case at bar is not that Congress failed to exercise its powers as to an entire class or field of activities, *e.g., Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1945), which contention the Iowa and Virginia cases concern.

[68] *See Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

[69] *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

legitimate end of removing substantial adverse effects on interstate commerce, and this is not resolved by any presumption or by blind deference to Congress. *Heart of Atlanta Motel, supra* at 262, 271, 273.

At the core of the discriminatory treatment between Indiana and Appalachia is land use. In the latter area, a variance from the AOC requirement is provided where the AOC requirement is not necessary to and will not facilitate a particular proposed postmining land use. In Indiana, no variance from the AOC and prime farmland requirements is allowed, even where such requirements are not necessary to and will not facilitate or allow other land uses. In the situation of prime farmland, the prime farmland and AOC requirements were specifically designed to require a farming use. The only legitimate rationale for denying variances in Indiana from the AOC and prime farmland requirements would be that they are necessary to the achievement of a specific postmining land use and that any change in the postmining land use which might result from such variances would create a substantial adverse effect on interstate commerce.[70] But the only effect on commerce which the Secretary has even argued relates to a change in land use on prime farmland. However, a change in the land use of prime farmland to other uses has no substantial and adverse effect on commerce.

In other words, it could well be that prime farmland would have a greater productive capacity or utility given local needs and conditions if it were returned to a rolling topography with lakes and used for residential, commercial, or forestry purposes. However, this change in land use or utility which is being prevented does not have a significant and adverse effect on interstate commerce. At the same

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[70] As previously demonstrated, the AOC requirement and the prime farmland requirements in Indiana do not serve any other legitimate interest, i.e., water pollution control. See pp. 7-10; 45-46 *supra*.

time, the AOC requirement as applied in Appalachia can be varied where it is unnecessary and a variance will facilitate an "equal or better economic or public use" as compared with premining use [§ 515(c)(3)(A), (e)(3)(A)]. Hence, the nonvariable prime farmland and AOC requirements on prime farmland are designed to allow only farming and preclude other land uses without a legitimate basis.

A change in land use to other than a farming use on non-prime farmland has never been argued by the Secretary to have an effect on interstate commerce, nor is there any rational basis to support such a contention. However, in Indiana the AOC requirement is nonvariable as to non-prime farmland. For instance, if a rolling topography is present prior to mining, or any topography less than a 20° slope, the land must be returned to a rolling topography, even though such topography might not be suited for an equal or better economic or public use, as an airport, farming or the like. Yet, as to steep slopes and mountaintops in Appalachia, a variance is allowed from the AOC requirement based on a proposed equal or higher economic or public postmining land use. This disparate treatment cannot be justified based upon the alleviation of substantial adverse effects on interstate commerce.

The Secretary has also argued that the prime farmland provisions do not require a postmining land use of farming. Even if this is so (which it is clearly not, see notes 7 & 8 *supra),* the discriminatory treatment still remains both as to prime farmland and non-prime farmland in that the operators and States in Appalachia are allowed to vary the AOC requirement where such is not necessary and a variance will facilitate a postmining land use. However, the same treatment is not allowed Indiana and the operators in Indiana as to the AOC and prime farmland requirements.

Moreover, in Indiana, where the AOC and prime farmland requirements are unnecessary to a proposed postmining land use, or, practically speaking, prohibit a

specific postmining land use, these requirements result in economic waste and are irrational. Hence, discrimination by variances based on postmining land uses for Appalachia while denying such variances based on land uses in Indiana becomes unsupportable by any rationale. Therefore, the AOC and prime farmland provisions as applied in Indiana are contrary to the equal protection and substantive due process requirements of the Fifth Amendment.

V. THE CHALLENGED PROVISIONS TAKE PROPERTY WITHOUT JUST COMPENSATION

The Secretary attempts to divert the Court's attention from the fact that the prime farmland provisions and § 522, by precluding surface mining, effect a taking of appellee coal companies' mineral interests in land to which they do not necessarily own the surface rights, thus effecting a taking of their total interest in the land.[71]

This Court has recognized that the ownership of coal rights, separate and apart from the fee simple, is a tangible interest in land,[72] and that if the extraction of the coal is prevented by legislation, the owner's property has been taken without just compensation. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414 (1922).[73] The challenged

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[71] That underground mining might be a feasible alternative in some areas of the Nation does not save appellees' Indiana coal rights, which are within the area of surface mineable reserves at depths of less than 150 feet [JA 69-70]. Even the deeper Indiana coal deposits are not economically mineable by the underground method because such deposits are thin, undulatory, erratic and multi-bedded with numerous shale partings. In addition, Indiana has a known fault running along its western boundary that disrupts the coal seams and results in adverse roof conditions [JA 79-80]. That Indiana coal deposits are not economically mineable by the underground method is confirmed by the fact that surface mining accounts for 99% of Indiana's coal production [JA 72, 81].

[72] Indiana law, like that of other states, recognizes the creation of estates in coal, independently of the fee simple. *See, e.g., Short v. Texaco, Inc.,* 406 N.E.2d 625, 627 (Ind. 1980); *Pyramid Coal Corp. v. Pratt,* 229 Ind. 648, 99 N.E.2d 427 (1951).

[73] The Secretary attempts to distinguish *Mahon* by arguing that the statute therein was aimed only at adjusting private legal (con't)

provisions of the Act affect appellees' coal rights and rights to mine so as to constitute a taking of their property rights without just compensation in violation of the Fifth Amendment.[74]

The most subtle, yet pervasive, taking of appellees' property is effectuated by the prime farmland provisions.[75] The taking effect of the foregoing provisions results from the technological impossibility of those requirements. The bottom line is that surface mining will not be allowed on prime farmland unless it can be demonstrated that the land can and will be restored to its prior productivity. Where the productivity is under a high level of management, it is

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rights, not protecting the public health or safety [Va. Br. 57 n.34]. It is apparent from a review of *Mahon* that the Court's decision was not based on such a distinction. While the Court noted that the case involved a single private house, it went on to state, "No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth." 260 U.S. at 413. In *Penn Central, supra* at 127, this Court duly noted that, "Pennsylvania Coal Co. v. Mahon, . . ., is the leading case for the proposition that a state statute that substantially furthers important *public policies* may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" [Emphasis added.] Accordingly, the Court's decision in *Mahon* is particularly relevant to the case at bar.

[74] Appellee coal companies hold such coal estates in prime farmland to which they do not own the surface rights, and intend to mine such land in the immediate future. [Pl. Ex. 33, 34; R. 961, 963; Tr. 67-68.] They also hold surface coal mining permits for operations on lands that are subject to the Act, most of which contain significant amounts of prime farmland. [Pl. Ex. 7, 8, 31; R. 439, 469, 540; Tr. 67-68.] Therefore, the Secretary's contention that the taking issue is not ripe for adjudication is without merit. Moreover, this Court has recognized facial challenges to regulatory measures concerning the regulation of the use of land. *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106, 112 (1980). " 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974). See also *Andrus v. Allard,* 444 U.S. 51, 62 L.Ed.2d 210, 222 n.21 (1979).

[75] In order to obtain a permit to mine on prime farmland, the operator must demonstrate that he can and will restore the land

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technologically impossible to achieve that standard or make such a showing.[76] Even if a permit is issued, the bond will not be released until the postmining soil productivity achieves a high level of management yield where that is the prevailing level of management in the surrounding area or was applied to the land prior to mining, which, again, is technologically impossible. As Dr. William McFee, Professor of Agronomy at Purdue University, testified, there are no known studies or experiments conducted by agricultural schools, or any other scientific data, which demonstrate that prime farmland can be restored to its premining level of yield

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"to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. . . ." Section 510(d)(1). Pursuant to § 508(a)(2)(C), the reclamation plan submitted as part of a permit application for mining on prime farmland must specify "the productivity of the land prior to mining, including appropriate classification as prime farm lands, . . . obtained under *high levels of management.*" [Emphasis added.] The operator's performance bond will not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same oil type in the surrounding area under equivalent management practices. . ." [§ 519 (c) (2)].

[76] The Secretary's contention that the Act only requires that prime farmland be reclaimed to levels of yield equivalent to those of surrounding lands is not dispositive because the Act still requires the reclamation of prime farmland to the "equivalent" of a "high level of management" yield where that is the practice in the area or was applied to the permitted land before mining.

Until the May 16, 1980 Round II Decision of the District Court for the District of Columbia [see note 7 *supra*], the Secretary contended that a high level of management yield was the target yield by which success of reclamation had to be determined on all prime farmland, 30 C.F.R. § 785.17(b)(8). This regulation was invalidated by the District Court for the District of Columbia [slip op. at 47], from which ruling the Secretary does not appeal. It remains that where the level of management on the prime farmland prior to mining was a "high level" or where a high level of management is the prevailing practice in the surrounding area, this level of production is still the standard for § 510(d) and § 519(c)(2).

The Secretary grossly exaggerates the effect of the District Court's ruling with respect to § 519(c)(2). The District Court's

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under high levels of management,[77] and, at best, premining productivity can be achieved only as judged by the "basic level of management" standard [JA 137], which is significantly less than the "high level of management."[78] Another expert, Alten Grandt, who conducted the studies on which the Secretary relies,[79] testified that under the current state of the art, it is technologically impossible to reclaim prime farmland to a premining level of productivity as judged by the high level of management standard [JA 142].

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ruling was very narrow and invalidated only that portion of § 519(c)(2) that prohibits the release of bond on prime farmland until its premining productivity under equivalent levels of management has been achieved, since this is impossible where the yield required is under a high level of management. [See JS App. 40a-41a.] All the environmental protection standards are still applicable to mining operations conducted on prime farmland, as are voluminous reclamation requirements.

[77] The intent of Congress was that this be shown "by agricultural school studies, or data for comparable areas" [H.R. REP. (CONF. REP.) No. 95-493, 95th Cong., lst Sess. 105 (1977).] Hence, the Secretary's regulations require "available agricultural school studies or other scientific data . . ." [30 C.F.R. § 823.15(c)(7)] to support the operator's showing.

[78] The productivity of corn and soybeans is as much as 30% greater under a "high level of management" than under a "basic level of management" [Dr. McFee, JA 137]. Mr. Alten Grandt, testifying from published data concerning corn yields in Illinois, stated that a high level of management would result in 167 bushels per acre in Muscatine silt loam soil, while a basic level of management would result in only 104 bushels per acre. [JA 140-41.] In southern Illinois soils, the yield results would be 115 bushels per acre and 63 bushels per acre, respectively. [*Id.*]

[79] The Secretary also relies on several articles authored by Mr. Grandt for the proposition that prime farmland can be reclaimed to its premining productivity under high levels of management. [See Ind. Br. 34 n.20; References 3, 5, 7 to Smith's affidavit; R. 803, 813, 826.] But as Mr. Grandt testified, none of his articles stand for the proposition asserted by the Secretary [JA 139]. The Secretary distorts the results attributed to Mr. Grandt. For example, Smith's affidavit states that Mr. Grandt has concluded that corn and soybeans can be grown on reclaimed land and that a "high level of *productivity*" can be achieved. [JA 107.] Significantly, Smith does not swear that premining productivity

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The Secretary argues for the moment that the term "high level of management" is undefined, that such level of reclamation is not required by the Act,[80] and that, alternatively, it can be achieved. His assertions are notably contrary to the evidence, including the testimony of his own witnesses,[81] the language of the Act and his position in the

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can be achieved under a "high level of *management*" standard. The Secretary also cites Mr. Grandt's testimony that high levels of productivity are equivalent to levels of productivity obtained under basic levels of management. [Ind. Br. 33 n.19.] But Mr. Grandt testified, "high levels of *productivity*" are *not* as high a yield as productivity obtained under a "high level of *management*." [JA 142.] Mr. Grandt's testimony demonstrates the significance of the difference between the general terms used by the Secretary and his witnesses and the scientific standard required by the Act, "high level of management." Appellees have never argued that crops cannot be grown on reclaimed prime farmland. The evidence clearly establishes, however, that premining productivity cannot be achieved under high level of management.

[80] The Secretary's assertion is also belied by his Memorandum in Support of Federal Defendants' Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Second Round") (hereinafter "Secretary's Brief") at 117 in *In re Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. May 16, 1980), where he argued: "Moreover, the concept of 'high level of management,' something above average, is commonly used in the agricultural community as a basis for predicting long-term potential crop yields[4] . . . [which is] the same type of information which agriculturalists regularly use in making annual predictions of expected yield." [Footnote omitted.] In footnote 4 the Secretary identified the source of the definition of the term "high level of management," that being, "U.S. Soil Conservation Service, Soil Survey Manual, U.S. Department of Agriculture, Agriculture Handbook No. 18, 1951, pages 369-370, Administrative Record Accession #178.5, cited in the preamble to the final rules at 44 Fed. Reg. 15285." See also JA 157.

[81] Mr. Smith stated only that prime farmland can be returned to its "pre-mining *productive capability*" [JA 106; emphasis added]. Mr. McCormick stated that "mined prime farmland [can] be restored to its pre-mined *capability,*" [JA 122; emphasis added] and he testified only that premining productivity could be achieved under "*good management practices*" [JA 157; emphasis added]. He admitted, however, that "good level of management

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regulations litigation. It is clear that the terms "high level of management" and "basic level of management" are accepted scientific terms of art [JA 136-37, 142, 157]. The Federal Government has established a definition for the term "high level of management" which is used in soil survey interpretations that are stored on computers by the Government [see note 77 *supra;* JA 157]; and this definition is the basis of the "high level of management" standard required by the Act [JA 159].

The portion of the Task Force Report relied on by the Secretary merely sets forth "*arguments*" about possible techniques for reclamation of mined prime farmland which *might* result in equivalent levels of yield (and which make no mention of yields under "high" versus any other levels of management) [JA 57-59]. The Secretary ignores the immediately following portion of the Report [JA 59-61], which states that such "arguments" are but "theories and

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has a wide range in kinds of interpretations, depending upon who you are talking to" [JA 159].

The statements of Imhoff and Wickline establish only that no permits to mine on prime farmland have been denied in Indiana, with the Secretary implying that mine operators have shown that they can reclaim the land to a high level of management yield. But in fact, Wickline confirmed that all Indiana operations were grandfathered pursuant to § 510(d)(2) [JA 153-54], and, therefore, the operators did not have to make such a showing in order to obtain a permit.

Furthermore, Wickline brought with him at trial a document [JA 96-100] showing how the Soil Conservation Service is currently making the determinations that prime farmland can be reclaimed as required by the Act. It shows that the determination is based upon merely whether the operator will mechanically replace the soil horizons as required, see § 515(b)(7), and that no determination of postmining yield is being made. Power's articles [References 4, 6 to Smith's affidavit; R. 811, 820] also do not support the Secretary's position. They merely note the results of experiments that have been conducted, but do not compare such results with the yields obtained before mining. Power qualified his articles by stating that the conclusions presented were tentative pending further experiments (Ref. 4), and acknowledging that there is little or no research to guide agriculturalists in managing reclaimed land (Ref. 6).

proposals," and that "there is no demonstration to date that prime farmland . . ., after having been reclaimed . . ., [will] give equivalent crop performance" [*id.*, at 59]. More significantly, arguments are not facts or "studies or other scientific data," as operators must submit to obtain a permit [see note 77 *supra*].

Thus, none of the matter relied upon by the Secretary supports the proposition that prime farmland can be reclaimed to its premining productivity as judged by the high level of management standard, as required by the Act.[82]

As a result of the technological impossibility of the showing a mine operator must make in order to obtain a permit to mine on prime farmland or the release of a performance bond, appellee coal companies' sole and exclusive interest in coal deposits will be destroyed without just compensation. Even if a particular land use regulation is valid, if the impact of the regulation is such as to destroy the owner's property interest, the owner's property has been taken without just compensation.[83] Therefore, such provisions take appellees' property without just

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[82] The technological impossibility of the prime farmland reclamation requirements was also noted by the District Court in *Star Coal Co. v. Andrus*, No. 79-171-2 (S.D.Iowa Feb. 13, 1980), slip op. at 15, *appeal pending*, No. 80-49:

> Star Coal contends that this [productivity standards of §§ 510(d) and 519(c)(2)] is a technologically impossible requirement to meet under the current state of the art and has introduced evidence to the effect that once stripped for mining, topsoil structure cannot be returned to its former state for at least 20 years. This evidence suggests that the regulatory agencies may need to give this requirement a liberal construction in interpreting the reclamation standard in the context of the state of the art.

But to ignore the constitutional infirmity due to the impossibility of the requirement on the basis that the regulatory agency may need to be "lenient" in interpreting the requirement, as the Iowa court apparently did, flies in the face of all known constitutional principles.

[83] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 135-36 (1978).

compensation in violation of the Fifth Amendment.

Furthermore, § 522(a), (c) and (d) prohibits, and/or provides for the prohibition of surface mining, or any activity associated with surface mining,[84] where a surface mining use would be incompatible with existing land use plans or programs or might affect fragile or historic lands resulting in damage to "historic, cultural, scientific, and esthetic values. . ." [§ 522(a)(3)(A)-(B)]. Section 522(a)(2) dictates that land *shall* be designated unsuitable for surface coal mining if reclamation as required by the Act is not "technologically and economically feasible." Because of the technological impossibility of the prime farmland reclamation requirements, all prime farmland is subject to such designation. As previously stated, appellee coal companies own the mineral rights to coal which is subject to the foregoing provisions, and if such designation is made, appellees' total property interest will be taken without just compensation.[85]

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[84] Section 510(b)(4) provides that no permit will be granted to mine on land that has been designated unsuitable for surface mining.

[85] That § 522(a)(6) excepts lands from being zoned unsuitable for surface mining where "substantial legal and financial commitments" were made "prior to January 4, 1977" does not cure the constitutional infirmity because it only recognizes those commitments that were made prior to January 4, 1977 and does not alleviate the situation where land is purchased subsequent to that date and is thereafter zoned unsuitable. Moreover, this Court has recognized that a taking can occur even where the property was acquired subsequent to the legislative encumbrance of its use. *Andrus v. Allard,* 444 U.S. 51, 62 L.Ed.2d 210, 222 n.21 (1979). Thus, an exception to the Act's applicability to certain lands does not change the constitutional issue.

Furthermore, the definition of "substantial legal and financial commitments" includes much more than merely the value of the land itself. *See* 30 C.F.R. § 762.5. That term has been interpreted by the Secretary to require not only that the land be owned, but also that it be part of an ongoing mining operation and that a significant investment have been made on the basis of a long-term coal contract in power plants, railroads, coal mining and handling equipment and the like. The definition expressly states

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Similarly, § 522(e)(4) and (5) zones the area within 100 feet of a cemetary or the outside right-of-way of any public road, and within 300 feet of any occupied dwelling, public building, school, church, community or institutional building or public park as off limits to "surface coal mining operations." This effectively prohibits[86] any and all beneficial uses of appellees' property. Accordingly, § 522(e)(4) and (5) effects a taking of appellees' property without just compensation in violation of the Fifth Amendment[87] and the District Court's ruling concerning § 522 was proper in all respects.[88]

The Secretary's legal analysis [Va. Br. 51-58] is irrelevant

that, "Costs of acquiring the coal in place or of the right to mine it without an existing mine,. . ., alone are not sufficient to constitute substantial legal and financial commitments." 30 C.F.R. § 762.5. Therefore, a landowner can still be deprived of his entire property interest without just compensation.

[86] See pp. 13-14, 47 n.66 *supra.*

[87] The Secretary's contention that the validity of § 522(e)(4) and (5) is saved by the fact that § 522(e) does not apply to "valid existing rights" is without merit. The term "valid existing rights" means substantially more than the legal ownership of the property affected. Pursuant to 30 C.F.R. § 761.5, not only must the mine operator own the land, but he must also have had a permit to mine it on or before August 3, 1977, or must demonstrate "that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977." In addition, the "valid existing rights" exception does not apply to land or permits acquired after August 3, 1977. See note 85 *supra.* Furthermore, the waiver authorized by § 522(e)(5) is applicable only to occupied dwellings, and not to the buffer zones established around other structures or property. The waiver provision is also an unconstitutional delegation of power to private parties, contrary to the Fifth Amendment. See Liebmann, *Delegation to Private Parties in American Constitutional Law,* 50 IND. J. L. 650, 675-80 (1975). Thus, § 522(e)(4) and (5) totally prohibits the mining of coal owned by appellees, as well as all other uses of the land associated with surface mining, without just compensation.

[88] The decision of the District Court concerning the invalidity of § 522 is consistent with that of the Court in *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus,* 483 F. Supp. 425 (W.D.Va.), *prob. juris. noted,* Nos. 79-1538 and 79-1596 (1980).

to the taking effect of the provisions in question in the case at bar. First, no variances are allowed from those provisions as there are for the steep slope or mountaintop AOC requirement. Second, the Secretary's arguments concerning the character of the governmental intrusion and the relevant factors involved in determining whether a taking has occurred do not apply to a situation where, as here, appellees' property rights, i.e., their coal deposits, will be completely and totally destroyed.[89]

The Secretary's argument that this Court's decisions "suggest" that a governmental body may prohibit noxious uses of property, and, therefore, the provisions of the Act in question do not effect a taking, is totally misdirected [Ind. Br. 31; Va. Br. 55-58]. The precedents relied on by the Secretary all involve the *States'* regulation of the use of land pursuant to their inherent police power. Unlike the States, however, Congress has no power to legislate for the general welfare, except with respect to its taxing and spending powers, and, specifically, has no general police power.[90] Accordingly, the Act cannot be sustained on the basis that it is an exercise of some nonexistent Federal police power.

Furthermore, the cases which establish that the States can prohibit the noxious use of property, even though not applicable to land use control measures enacted by Congress, do not go as far as the Secretary would have the Court go here. Those cases do not hold that a noxious use can be prohibited without just compensation where there is

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[89] There can be no balancing of public and private interests where the landowner is left with absolutely no beneficial use of his property interest whatsoever. *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n.36 (1978). Accordingly, the diminution in value and lack of alternative uses of appellees' property is quite relevant (in fact, dispositive) where, as here, there is no beneficial use of the property remaining.

[90] *Kesler v. Department of Public Safety,* 369 U.S. 153 (1962); *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936); *United States v. Butler,* 297 U.S. 1, 64-67 (1936); *Kansas v. Colorado,* 206 U.S. 46, 89-90 (1907).

absolutely no use left to the property owner at all, which is the precise effect of the provisions in question in the instant case.[91] Therefore, even if the Federal Government had a police power like that of the States, which it does not, the Constitution does not condone the measures in question where the effect is that the landowners' total property interests will be extinguished.

The lack of merit of the Secretary's argument that appellees should seek compensation under the Tucker Act before challenging the constitutionality of the Act is apparent on its face. The Secretary admits that such action may not even lie. In addition, the instant action is one for declaratory judgment, not for the recovery of damages. That is, appellees challenge Congress' power to take their property under the provisions in question, and are not merely seeking compensation for the property that has been so taken. The Court of Claims has no jurisdiction to adjudicate such a claim. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 102 (1978); *United States v. Testan*, 424 U.S. 392, 397-98 (1976).

VI. SECTION 518(c) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The District Court's ruling on the procedural due process issue is consistent with the decisions of this Court. While appellants contend that the District Court misunderstood

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[91] Indeed, that alternative uses remained is the reason that this Court upheld the State prohibition of the use of property for manufacturing liquor in *Mugler v. Kansas*, 123 U.S. 623 (1887). The Court specifically noted therein that "Such legislation does not disturb the owner in the control or use of his property for lawful purposes,. . . ." 123 U.S. at 669. That the availability of feasible alternative uses is essential to sustaining a State land use control measure was reaffirmed by this Court as recently as 1978 in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), where it was acknowledged that "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." [438 U.S. at 131.]

the procedure established by § 518(c), it is apparent from its ruling that it did not.[92]

It is firmly established that the Fifth Amendment forbids the taking of property without due process of law. An essential element of due process is that a person be afforded a meaningful hearing before his property is taken.[93] *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970). Only in extraordinary circumstances, where a valid and overriding governmental interest is at stake, can the hearing constitutionally be postponed until after the deprivation has occurred. *Boddie v. Connecticut,* 401 U.S. 371, 378-379 (1971).

The effect of § 518(c) is that a mine operator charged with a violation is forced to purchase his due process rights. Once the Secretary determines, to his own satisfaction, the amount in which the penalty should be assessed, the mine operator has no choice but to prepay that amount to the

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[92] The District Court specifically noted that "[t]he administrative procedure providing for an informal conference before the assessment of the proposed penalty. . . is insufficient to cure the constitutional infirmity of § 518(c)." [JS App. 44a.] To be meaningful, the hearing provided must be before a neutral party. To argue that a person charged with a violation is afforded due process by having an informal conference with the same person or agency that is charging him with a violation flies in the face of this firmly established principle.

[93] The cases relied upon by the Secretary and *amici* for the proposition that a hearing is not required before a person's property can be taken or that a hearing at any time constitutionally suffices are inapposite to the case at bar. Those cases, *e.g., Matthews v. Eldridge,* 424 U.S. 319 (1976); *Arnett v. Kennedy,* 416 U.S. 134 (1974), all involved the termination of governmental benefits or services, not the deprivation of an individual's exclusive property rights. There is no decision of this Court that holds that it is constitutionally permissible to require prepayment of a proposed penalty before a full evidentiary hearing as to the merits of a violation of the law. Even in pre-termination situations such as welfare benefits, an evidentiary hearing is required prior to the termination of such benefits. *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Secretary in order to preserve his constitutional right to contest the fact of the violation or the amount of the proposed penalty.

Even a balancing of governmental and private interests [*e.g., Matthews v. Eldridge,* 424 U.S. 319 (1976)] cannot sustain the prepayment requirement of § 518(c). The only asserted governmental interest at stake is administrative convenience in the prompt collection of penalties. Administrative convenience clearly does not outweigh the deprivation of potentially thousands of dollars as the result of an alleged violation.[94] Therefore, the District Court correctly ruled that the prepayment requirement of § 518(c) violates the Fifth Amendment.[95]

CONCLUSION

The Surface Mining Act presents several constitutional issues in contexts not previously before this Court, the most important of which go to the fundamental structure of Federalism implicit in the Constitution that guarantees a meaningful, separate and independent existence for the States. If the Commerce Clause evolves to devour State land use planning and control, "experience" would dictate that the States would be relegated to being but "puppets of a

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[94] This conclusion is particularly compelled in light of *Goldberg v. Kelly,* 397 U.S. 254 (1970), where it was held that even conserving the public treasury did not outweigh a recipient's right to welfare benefits.

Furthermore, there are less intrusive alternative methods to compel the payment of final penalties. For example, Congress could have authorized the Secretary to suspend the permits of an operator who does not promptly pay the penalty, or could have authorized the recovery of litigation expenses to recover penalties.

[95] The validity of § 518(c) is not preserved by the fact that the prepaid penalty will be refunded with interest if an operator's challenge is successful. The Fifth Amendment prohibits even the temporary deprivation of property without a hearing. *Fuentes v. Shevin,* 407 U.S. 67, 85 (1972). See Motion to Affirm 28 n.36.

ventriloquist Congress" with the destruction of that fundamental structure being a *fait accompli.* Either the evolution of the Commerce Clause must take a different path, or the Tenth Amendment must evolve to pose detours,[96] so that the States will have the meaningful, independent and separate existence required by our Constitution. In either event, the challenged provisions must fall.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General
LINLEY E. PEARSON
Attorney General-Elect
JACK R. O'NEILL
Deputy Attorney General
For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR. *
BYRON L. MYERS
STEPHEN M. TERRELL
For Indiana Coal Association Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

**Counsel of Record*

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[96] See *amicus curiae* briefs filed by Mountain States Legal Foundation, at 3-11, National Coal Association and American Mining Congress, at 7-18, and National League of Cities, *et al.*

APPENDICES

APPENDICES

APPENDIX A

The prime farmland provisions are:

Section 507(b)(16) [30 U.S.C. § 1257(b)(16)] requires the applicant to identify in the permit application the location of "prime farmlands" on which surface mining operations are to be conducted, pursuant to the definition of prime farmland as established by the Secretary of Agriculture pursuant to § 701(20) [30 U.S.C. § 1291(20)].

Section 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] requires that the reclamation plan submitted with the application include a statement concerning "the productivity of land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, [or] fiber . . . from [prime farmland] under high levels of management . . . ."

Section 510(d)(1) [30 U.S.C. § 1260(d)(1)] requires that the regulatory authority, before issuing a permit for surface mining operations on prime farmland, shall consult with the Secretary of Agriculture, and grant a permit to mine on prime farmland only if the regulatory authority finds that the operator "has the technological capability to restore such mined area . . . to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 515(b)(7) . . . ."

Section 515(b)(7) [30 U.S.C. § 1265(b)(7)] requires the separate removal and replacement of the A, B and C soil horizons in the instance of prime farmlands.

Section 515(b)(20) [30 U.S.C. § 1265(b)(20)] as to that portion which provides, "when the regulatory authority approves a long-term, intensive, agricultural postmining land use," and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the

mining and reclamation plan . . ." and any other part which requires any postmining land use.

Section 519(c)(2) [30 U.S.C. § 1269(c)(2)] which provides that the bond for mining on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . . ."

APPENDIX B

The provisions requiring approval of changes in the postmining land use are: § 507(d) [30 U.S.C. § 1257(d)] which requires the submission of an acceptable reclamation plan, which must contain information regarding the premining and postmining use, as well as the productivity of land, and those which require a detailing in the plan of how the proposed postmining land use will be achieved, as well as necessary support activities for the proposed postmining land use, all as contained in § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)]; § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)] which require that a permit application be denied unless all of the application requirements are accurate and complete and that the reclamation requirements including the land use concepts as set forth above, "can be accomplished;" and certain portions of § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)] which are respectively the "approved postmining land use plan," and "the regulatory authority approves a long-term intensive agricultural postmining land use," and "the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . . ."

APPENDIX C

The Indiana Act, which provides the parroting of the Federal Act so that Indiana can have a State Program, provides in IND. CODE § 13-4.1-1-1 (Supp. 1980) as follows:

Legislative findings. The general assembly finds that:
(1) P.L. 95-87, the federal Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. §§ 1201-1328], provides that the federal government will assume control of the regulation of surface coal mining operations and reclamation procedures within Indiana unless the state of Indiana enacts laws as specified by the federal act.

(2) The *federal act in many parts constitutes an intrusion* into *land use planning and control, an integral and traditional aspect of the sovereignty of the state of Indiana,* its people, and political subdivisions, as well as numerous other state and local governmental functions as reserved to them by the Tenth Amendment of the Constitution of the United States.

(3) Since 1941, the state of Indiana has enacted legislation governing the methods of strip mining and reclaiming coal bearing land within Indiana and the enforcement of these state laws has resulted in an environmentally well managed coal industry in the state of Indiana that is required to reclaim strip mined land and to return that land to its highest and best use prior to release of a statutorily required bond sufficient to cover the costs of reclaiming any land left unreclaimed by a mine operator.

(4) *The threat that the federal government will regulate the surface coal mining operations and reclamation* procedures, *including land use planning and control,* if the state of Indiana does not enact the necessary legislation for a state program, *is coercive. It makes the overriding consideration whether to prevent further federal encroachment upon and regulation and control of the state, its people, and local*

industry, rather than what is in the best interest of the people of the state of Indiana, considering local employment opportunities, financing of local government, and the use of local and state natural resources with consideration for the geography and terrain of the area.

(5) The state of Indiana has challenged the federal act in a lawsuit presently pending before the United States District Court for the Southern District of Indiana, Indianapolis Division, entitled STATE OF INDIANA: OTIS R. BOWEN, M.D., Governor of the State of Indiana; JOSEPH D. CLOUD, Director of the Indiana Department of Natural Resources; and INDIANA DEPARTMENT OF NATURAL RESOURCES; Plaintiffs, vs. THE UNITED STATES OF AMERICA; CECIL D. ANDRUS, as Secretary of the United States Department of Interior; WALTER J. HEINE, as Director of the Office of Surface Mining Reclamation and Enforcement; OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; UNITED STATES DEPARTMENT OF INTERIOR, Defendants [IND. CODE § 13-4.1-1-1 (Supp. 1980), as added by Acts 1980, P.L. 101, § 3.] [Emphasis added.]

Indiana beginning in 1941 extensively regulated reclamation of surface coal mining activities, *see* IND. CODE § 14-4-2-1 *et seq.*, and in 1967 began even more extensive regulation, *see* IND. CODE § 13-4-6-1 *et seq.* In fact by the 1960's, surface coal mining was not contributing at all to water pollution. *See Section 208 Water Quality Management Planning For Region Seven,* which is a study that determined "[t]he only mine drainage problems documented were caused by coal mines abandoned prior to 1967 Indiana Surface Mine Act (IC § 13-4-6 *et seq.*)." [JA 102.]

FILED
JAN 12 1981

Nos. 80-231,
79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, *et al.*,
Appellants,

vs.

STATE OF INDIANA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant (No. 79-1538),
Appellee (No. 79-1596),

vs.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., *et al.*,
Appellees (No. 79-1538),
Appellants (No. 79-1596).

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
Special Counsel to the State of Illinois
One North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 346-7800

Attorneys for Amicus Curiae, The State of Illinois

MICHAEL J. DUFF
NISEN, ELLIOT & MEIER
Chicago, Illinois
Of counsel.

Printed by the Authority of the State of Illinois—1-81-200

QUESTIONS PRESENTED

Title V of the Surface Mining Control and Reclamation Act of 1977, §§501-29, 30 U.S.C.A. §§1251-79 (Supp. 1980), contains the principal regulatory and enforcement provisions of the statute. These include federally mandated state laws, organizational attributes, processes and rules which states must adopt if they wish to maintain exclusive jurisdiction over the regulation of surface mining and reclamation operations within the state. The statute also contains a variety of demands and limitations affecting the present and future uses of lands utilized for surface mining generally and prime farmlands in particular. In effect, these constitute federally decreed land-use controls and regulations.

The legal issues of particular concern to the *amici* are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act violate the Tenth Amendment.

2. Whether the same provisions exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-231

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants, *

v.

STATE OF INDIANA, ET AL.,
Appellees. **

On Appeal From the United States District Court for the Southern District of Indiana

BRIEF OF THE NATIONAL LEAGUE OF CITIES AND THE STATES OF ARIZONA, KANSAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

INTERESTS OF AMICI CURIAE

This *amicus curiae* brief of the National League of Cities and the States of Arizona, Kansas, and Utah as *amici curiae* is submitted with the written consent of all the parties. The letters of consent are on file with the Clerk. Rule 36.1. With respect to the States, consent is not required. Rule 36.4.

* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers their views in the case at bar.

Joining with NLC on this *amicus curiae* brief are the States of Arizona, Kansas, and Utah. The States, having continually exercised their powers to regulate the use of private nonfederal lands within their borders, have a compelling interest in preserving these integral functions.

In filing this brief in support of the Appellees, the *amici* do not want their action to be misinterpreted. Unequivocally, the *amici* are not opposed to nor do they otherwise resist reasonable and necessary regulation and control in the public interest of surface mining as such. Rather, the *amici* argue that the methodology chosen by Congress and embodied in Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act") §§501-29, 30 U.S.C.A. §§1251-79 (Supp. 1980), is objectionable both as a legal and as a practical matter as well. Accordingly, the interests of the *amici* in the case at bar stem from their concern for the potentially disruptive consequences to our federal system of governance, and concern for the potentially adverse impact upon the role of state and local governments in that system, should the holdings of the court below be summarily reversed and the methods, rules and postulates embodied in the Act be endorsed as a matter of law by this Court.

At issue in the case at bar are the circumstances, if any, or the extent to which the federal government can mandate and control the organization, procedures and other acts of state governments as governments, and the validity of the federally mandated land-use controls required under the provisions of Title V of the Act.

The relevant sections of the Act deal with surface mining generally and the mining of prime farmlands in particular. These provisions, among other matters, involve the state laws, regulations, organization and procedures which states must adopt and implement if they wish to maintain primary regulatory authority over surface mining and reclamation activities within their borders. The several sections of the statute also establish a variety of requirements for surface mining operations on private lands generally, and particularly lands defined by the federal government as "prime farmlands". These include injunctions against mining of lands located near dwellings, public buildings, parks, schools, churches, etc., and other strictures. Other requirements extend to the post-mining uses of mined lands and include the requirement that mined farmlands be restored to original contour and productivity as farmland.

The court below concluded that various portions of Title V of the Act exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment and declared these provisions to be invalid. The *amici* urge that these decisions of the court be affirmed.

While the disputes presented in this appeal are raised in the context of federal control of mining, there are underlying controversies which are more far-reaching

than the regulation of surface mining. These issues involve the role of states in the federal system as contemplated and protected by the Constitution, and address the Constitutionally mandated organizing principles which govern or should govern the structure and operation of that federal system in which state and local governments must function and discharge their responsibilities.

Stated in these terms, the fundamental questions suggested by the case before this Court can be described in this fashion:

> First, do the Constitutional precepts of federalism and state sovereignty exemplified by the Tenth Amendment preclude attempts by Congress to displace the established and traditional authority of states to regulate in the public interest the uses of private lands within the borders of the state?
>
> Second, do these same Constitutional precepts of federalism preclude the federal government from attempting to force the states to become unwilling agents of federal laws and enforcement procedures by threats of federal pre-emption of the state's authority to regulate and police the use of private lands within the state?
>
> And finally, does Congress' authority "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" support federal laws to police the use of private lands within the several states?

In sum, is it Constitutionally appropriate for the federal government to pre-empt responsibility for zoning and land-use planning and controls, and to induce or mandate state legislation, state governmental structures and enforcement procedures to this end, and otherwise to police and regulate all of society in the interests of "protecting" interstate commerce.

The answers to these questions will suggest if the current trend toward the federalization of state and local governments will continue apace, or if under our Constitutional arrangement, the sovereignty, autonomy and separate and independent existence of state and local governments will continue to be a Constitutionally guarded attribute of the federal system of governance.

In part, it was the growing propensity for Congress to enact intrusive legislation together with the consequential obscurement of state versus federal responsibilities and the associated need for more concise and effective concepts of organization and accountability in the federal system which in the 1970's energized NLC, eighteen states and other concerned parties into an active defense of state (and local) government sovereignty against the incursions of the federal government manifested by Congress' efforts to set wage and hour conditions for state and local government employees. In 1976 this Court's ruling in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) was one of the results of these efforts. In that case, this Court enunciated the outlines of some Constitutionally mandated organizing principles which if followed in the future would do much to foster and to protect the effectiveness of the federal system. But even that ruling continues to be regarded as a judicial aberration and attacked as such by the federal government. *See, e.g.,: Amersbach* v. *Cleveland*, 598 F.2d 1033 (6th Cir. 1979), and *United Transportation Union* v. *Long Island R.R.*, No. 80-7199 (2d Cir. Sept. 15, 1980).

In the 1980's it is increasingly clear that the principles which led this Court to its conclusions in *National League of Cities*, require reiteration and perhaps

clarification as well. In the view of the *amici* the case at bar illustrates the continuing need to declare limits to the powers under the Commerce Clause when the use of such authorities by Congress jeopardizes the sovereignty of states and the ability of state and local governments to function in the federal system as the Constitution contemplates and mandates. At issue is the efficacy of the nation's system of governance — and its political viability as well.

SUMMARY OF ARGUMENT

The requirements of Title V of the Act include the laws, organization, processes and rules which states must adopt to maintain authority over surface mining and reclamation within the state. Title V also sets out a variety of limitations affecting the present and future use of private lands which constitute federally decreed land-use controls and regulations. These requirements exceed Congress' powers under the Constitution in three respects.

First, control and regulation of land use for the benefit of state residents are traditional and basic functions of state and local governments. This activity involves the exercise by states of their authority to enact and administer public laws and thereby to furnish public services to citizens of the state. The ability to discharge these responsibilities constitutes an attribute of state sovereignty which under the precepts of federalism, as exemplified by the Tenth Amendment, may not be impaired by Congress utilizing its authority under the Commerce Clause.

Second, these same precepts of Constitutional federalism protect state governments from the type of

federal coercion and infringement on their sovereignty represented by the provisions of the Act which mandate that states must enact laws and organize and administer specified planning and review procedures if the states are to retain authority to plan for and to control the uses of private lands within their borders.

And finally, the federally decreed land-use requirements and controls incorporated in the Act are characteristic of the powers reserved to the states under the Tenth Amendment and as such are not within the powers delegated to Congress under the Constitution.

For these reasons, the decision of the District Court, which concluded that specified portions of Title V of the Act exceed Congress' powers under the Commerce Clause and impinge upon the sovereign power of the State of Indiana in violation of the Tenth Amendment, should be affirmed.

ARGUMENT

1. Regulation Of The Uses Of Land Is An Integral Function Which Is Essential To The Separate And Independent Existence Of State Governments And Is Beyond The Reach Of Congressional Authority Under The Commerce Clause

The District Court found the challenged provisions of Title V of the Act to be unconstitutional, among other reasons, because they constituted federally imposed land-use plans and regulations which operated to displace state policies and choices on integral governmental operations and as such infringed upon the autonomy and sovereignty of states, a Constitutionally protected attribute.

The *amici* here urge that the exercise by a state government of its so-called police powers to regulate, in the interests of state residents, the uses of private lands within that state is a prototypical function of state and local governments. As such, it is protected by precepts of federalism against Congressional interference. What is involved and threatened is the enactment and administration by state governments of public laws governing the uses of lands within the state, and the provision thereby of basic and traditional state government public services to its citizens. As such, the ability to carry on these essential functions and to make the decisions which these activities entail are attributes of state sovereignty which may not be impaired by Congress under the Commerce Clause authority. At issue is the essence of statehood and states in the federal system.

This Court had occasion to consider "what is the correct idea of a State" in *Texas* v. *White*, 74 U.S. 700 (7 Wall.) (1868). Some of the observations of Chief Justice Chase were alluded to in National League of Cities and are a useful preface to consideration of the issues involving state government in the case before the bar.

> It ["state"] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
>
> . . . .
>
> In the Constitution the term state most frequently expresses the combined idea just

> noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. . . .
>
> . . . .
>
> Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,". . . . 74 U.S. at 720, 721, 725.

The essence of states and statehood is represented by the politically interdependent and functional combination of people, territory and government alluded to by Chief Justice Chase. The autonomy and sovereignty of a state government lies in its ability to exercise the powers reserved to it as a state and thereby to respond to the desires and needs of its citizens by providing necessary protections and suitable services. The services and protections represented by zoning and land-use controls derived through the exercise of the basic powers reserved to the state are, as the *amici* have suggested, traditional and integral state governmental services.

Chief Justice Marshall remarked on the existence in the states of a panoply of legislative powers available for the protection of their welfare and the promotion of local interests: "They form a portion of that immense mass of legislation, which embraces everything within the

territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves." *Gibbons* v. *Ogden*, 22 U.S. 1, 203 (9 Wheat.) (1824). And three years later, Justice Marshall distinguished this state legislative authority as the police powers. *Brown* v. *Maryland*, 25 U.S. 419, 444 (12 Wheat.) (1827).

The aims and aspirations of state governments — to which ends the police powers constitute the principal means — have been delineated over the years by our courts. For example, Justice Barbour wrote:

> Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says; the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.
>
> . . . .
>
> . . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. *New York* v. *Miln*, 36 U.S. 102, 133, 139 (11 Pet.) (1837).

While the conclusions of the Court in this case with respect to "intrastate commerce" are no longer authoritative, the language cited above would seem still valid as a description of the critical relationships which still exist today between the police powers and the responsibilities and aspirations of state governments to provide for the welfare of their citizens.

Regulation of land use in the interests of the public welfare has been and remains a primary and traditional means whereby state and local governments, exercising their police powers, seek to protect and improve the circumstances of their residents. The principles embodied in zoning ordinances have been spelled out by this Court:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.
>
> . . . .
>
> . . . [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 387, 389 (1926).

The propositions set out in *Euclid* have since been reiterated in many decisions in support of state land-use controls. Planning and zoning as a means of influencing the present and future physical development of a com-

munity in order to promote social and economic well-being have been established as traditional and integral functions of state and local governments. Land-use planning and control through zoning laws and their provisions "are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U.S. 490, 508 n. 18 (1975). It is a method whereby state and local governments offer individual citizens a means to express their values through the political system and thereby to decree how their communities should develop and grow.

The *amici* have suggested that the fundamental purpose, indeed the essence of state government, is to advance the safety, happiness, and prosperity of its people and thereby to provide for the general welfare, *Miln*. And further, that zoning, land-use planning and control to achieve these ends are basic and integral functions of state and local governments, *Euclid* and *Seldin*. Indeed, as recognized by this Court in these and other cases, there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and land-use controls as a traditional means to achieve these fundamental aims. *See: Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978); *Agins* v. *Tiburon*, _____ U.S. _____, 100 S. Ct. 2138 (1980); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).

Accordingly, as demonstrated above, land-use control and planning have been and are traditional state governmental activities involving essential decisions as to the conduct of integral functions carried on by states in their sovereign capacities. And the controls of these essential state decisions which Congress sought to wield

under Title V of the Act, if permitted, would jeopardize states' ability to function within the federal system as contemplated and protected by the Constitution.

As noted in *National League of Cities*, this Court has "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. The standard, in judging between permissible and impermissible federal regulation is whether there is federal interference with "functions essential to separate and independent existence." 426 U.S. at 845. In the context of the case at bar, state and local decisions with respect to the shape, growth, character, and industrial mix of individual communities within the state involve essential attributes of their "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In *National League of Cities*, the Court defined traditional functions as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Zoning and land-use planning are the basic and essential means available to state and local governments, utilizing their police powers to control and shape the physical and economic development of a given community in order to promote social and economic well-being for its citizens. And in the aggregate, community-oriented land-use controls shape the future of the entire state. This governmental function is, as we have said, the essence of state governance and as such should be held to be beyond the reach of the

Commerce Clause impairment contemplated by the land-use regulations of Title V of the Act. Consequently, the *amici* urge that the decision of the lower court be affirmed.

In this context, and given the fundamental importance to state governments of land-use regulation as a means of protecting its citizens and shaping the states' future, it seems appropriate to note that the lower court found that "surface coal mining operations on prime farmlands, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Indiana* v. *Andrus*, No. IP 78-500-C, 10 (S.D. Ind. June 10, 1980). When compared with the extent of impairment of essential state functions which the Act contemplates, in contrast with the traditionally local quality of state and local land-use regulation, and considering the importance of the state functions being undermined, and taking into account the value of keeping land-use decisions as close as possible to the citizens most directly affected, and considering the alternative means which are available to achieve the national aims expressed in and through the prime farmlands provisions of the Act, the *amici* urge this Court that the federal aims expressed in and through these prime farmlands provisions do not justify the kind of interference with state sovereignty which this federal law contemplates.

Accordingly, whether one regards the nature and the extent of the impairment of state sovereignty involved here or one balances the character of the federal and state interests involved, the conclusions of the court below are correct and should be affirmed.

2. Constitutional Precepts Of State Sovereignty Preclude The Federal Government From Mandating That The States Function As Agents Of The Federal Government As Contemplated By Title V Of The Act

The statutory arrangement embodied in Title V of the Act contemplates that a state must either cede to the federal government essentially all state authority over the matters covered by the Act (including control over land use) or, in the alternative, that the state will enact such legislation as may be satisfactory to the federal government and otherwise organize and conduct its surface mining and reclamation affairs as dictated by the federal government. In effect, the law contemplates that a state, if it is to retain traditional jurisdiction over and to participate in these matters, must do so not in its own right and sovereignty, but as an unwilling agent of the federal government. The *amici* urge this Court that such a coercive arrangement is unconstitutional as a violation of the precepts of federalism as exemplified by the Tenth Amendment. The court below has so held.

In its opinion, the court, as evidence of the coercive nature of the federal intervention in state prerogatives, recited the language of the Indiana Act passed to authorize the submission to the federal government of a state program. *Indiana* v. *Andrus*, No. IP 78-500-C at 24. The state legislature in its statute characterized the federal law as an intrusion into state and local government functions and justified its legislative response as an effort "to prevent further federal encroachment upon and regulation and control of the state, its people, and local industry, rather than [consideration of] what is in the best interests of the people of the State of In-

diana. . . ." IND. CODE ANN. §13-4.1-1 *et seq.* (Burns). The lower court also noted the expansionary impact of the federal intervention on the Indiana Department of Natural Resources' budget and staff. It concluded that

> The foregoing provisions [of Title V of the Act] require explicit governmental procedures and structures for land use planning and control, and contain explicit land use judgments which will either be implemented through direct Federal usurpation in a Federal program or mandated upon States to be contained within a State program, and constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control. The foregoing provisions are, therefore, contrary to the Tenth Amendment. *Indiana* v. *Andrus*, No. IP 78-500-C at 30.

The *amici* agree.

In *National League of Cities*, this Court found that the FLSA Amendments constituted an improper infringement on state and local governments because they "displace[d] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the states *qua* states, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress." 426 U.S. at 847-48. In the case at bar, the federal "displacement" involves the state legislative processes, the organization and operation of the states' executive departments, state policies and decisions with respect to present and future land uses, and the policies which govern the delivery to its citizens of essential land-

use planning and zoning services which are the essence of state governance. Under the federal Act it is the federal government which proposes to provide these services whether the citizens desire them or not.

These characteristic federal encroachments into state sovereignty, in the view of the *amici*, are symptomatic of a growing threat to and a pervasive hazard for the federal arrangement. If this threat is not adequately confronted by our courts and resolved in accordance with the Constitutional principles which guarantee reasonable autonomy for state governments, the trend will lead to further declines in the efficacy of our federal system. Stated very succinctly, because Congress recognizes that as a practical if not legal matter, the federal government cannot administer out of the Nation's Capitol, a national zoning and land-use control program such as the one contemplated under the Act, the federal government has attempted, from time to time, to devise an alternative governmental arrangement under which states are enticed or coerced into becoming federal agents for the implementation of federal policies.

For example, under the Clean Air Act ("CAA") Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, the Environmental Protection Agency ("EPA"), among other sanctions, claimed power in the event a State failed to comply with the CAA's requirements to promulgate its own plan and compel the unconsenting State to enact, finance, and enforce supporting legislation for the pollution control program. *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977).

The Ninth Circuit concluded in *Brown* that if the 1970 CAA Amendments were interpreted to authorize

sanctions against the states for failure to utilize their police and revenue powers to enforce EPA standards against private polluters, they would exceed the broadest permissible reach of cooperative federalism. 521 F.2d at 838-40. Faced with the same issue in *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), the Fourth Circuit stated: "[I]f there is any attribute of sovereignty left to the States it is the right of their legislatures to pass, or not to pass laws." 530 F.2d at 225. And the District of Columbia Circuit concurred in noting that EPA's claim constituted an "impermissible encroachment on state sovereignty." *District of Columbia* v. *Train*, 521 F.2d 971, 992 (1975), *vacated as moot*, 431 U.S. 99 (1977). The *Train* Court concluded:

> We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.
>
> What is really needed to accomplish the federal objective in this situation is state cooperation in the administration of a federal regulatory program, and Congress has available numerous means of obtaining that cooperation. . . . *Id.* at 992-93.

In oral argument before the Supreme Court, after *National League of Cities* was decided, the federal government shifted its position and agreed that the statute could not Constitutionally require the states to utilize their police and revenue powers to enforce EPA standards against private polluters. This would impinge upon their integral state function of determining whether and what laws to enact. In a *per curiam* opinion, the Supreme Court vacated and remanded the cases for consideration of mootness. *EPA* v. *Brown*, 431 U.S. 99 (1977).

The CAA cases and the federal government's revised position in light of *National League of Cities* reinforce the contention of the *amici* that federal enactments imposing affirmative duties on the states to exercise their police or revenue-raising powers in federally prescribed ways — such as the challenged CAA requires — are unconstitutional infringements on state autonomy. This CAA litigation is especially significant because air pollution is concededly a national problem whose solution requires the adherence of all — including state and local governments — to uniform national standards.

If the current condition of our federal system with its manifest confusions of the respective roles and responsibilities of its several levels of government, together with associated dissipation of concepts of accountability tells us anything, it suggests the desirability of a return to a more organized structure for the federal arrangement — assuming that effectiveness, efficiency and political responsibility are desirable attributes of a federal system. Accordingly, in the view of the *amici*, continued federalization of state and local governments is neither a warranted policy nor a direction in which the majority of the citizens wish to proceed.

Under constitutional law, voluntary movement toward federalization by individual states would seem to be a matter of state choice — which is to say an exercise of state sovereignty. But where as in the case at bar, the initiatives for federalization come from the federal level and the states themselves object and resist, then it would appear clear that traditional concepts of state sovereignty as exemplified by the Tenth Amendment should offer the protections necessary to preserve the autonomy of states in the federal system.

Accordingly, the *amici* urge that the decisions of the court below be affirmed and that in so doing this Court clarify and enunciate Constitutionally derived guidelines which will act to constrain federal intrusions into the basic roles and responsibilities of state governments.

3. The Authority To Regulate Interstate Commerce Does Not Support Enactment Of Federal Laws Which Displace State Authority To Police The Use Of Private Lands Within The State

Congress' authority to regulate commerce among the states, the *amici* urge, is something other than the authority to enact federal laws which duplicate and in effect displace the state authority to police the use of private lands located within that state. Accordingly, the land-use controls embodied in Title V of the Act are not within the powers delegated to Congress under the Commerce Clause of Article I, Section 8, of the United States Constitution.

In the view of the *amici*, the requirements of the Act dealing with land control aspects of surface mining on prime farmlands conflict directly with the proposition that land-use laws are one of the authorities reserved to the states and as such are the exclusive prerogatives of state governments and the police powers reserved to them. We understand, of course, that federal powers under the Commerce Clause can coexist with state police powers and that "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941). But the provisions of Title V of the Act under attack here present some distinguishing circumstances. In the first place, they are

not "appropriate and plainly adapted to the permitted end." *Id.* at 214. Second, the "police powers" character of the objectional provisions reflect their substance rather than their incidental characteristics. They are land-use regulations and are not regulations of commerce between the states.

Accordingly, the District Court concluded, with particular reference to the approximate original contour and postmining land-use provisions, that

> "The prime farmland provisions" are directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. Similarly, the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce. These sections, to the extent set forth, are not within powers delegated to Congress and are unlawful as being contrary to the Constitution. *Indiana* v. *Andrus*, No. IP 78-500-C at 15.

The *amici* share these conclusions. They have stated at the onset that they do not oppose controls over surface mining. But it is one thing to propose regulation, in the public interest under the Commerce Clause authority, of the commercial aspects of surface mining, and Constitutionally speaking, quite another matter to argue, as do the Appellants, that the Commerce Clause is an appropriate vehicle for federal control of land use generally, or even to regulate postmining land uses. We know of no Commerce Clause rationale, for example, that would support and authorize the federal government to police land uses in the pursuit of federally decreed "environmental values" (the words Senator Byrd used to

describe some purposes of the Act as quoted in the opinion of the court below *Indiana* v. *Andrus*, No. IP 78-500-C at 28) whether these values are expressed by the maintenance of acres of rolling farmlands as farmland over the objections of the land owners, or by maintaining against the owners' desires the traditional contours of those same lands. These matters of "environmental values" are reserved for state legislatures to decree.

The Tenth Amendment provides that the powers not delegated to the United States by the Constitution are reserved to the states. Chief Justice Marshall noted that the legislative powers which belong to the states, and are thereby available for the protection of the welfare and local interests of the state, are those which can be most advantageously exercised by the states themselves. *Gibbons* v. *Ogden*, 22 U.S. at 203. And Justice Barbour in *New York* v. *Miln*, *supra*, observed that the powers reserved to the states extend to those matters which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the state. Accordingly, the *amici* urge this Court that in accordance with the federal system of government described by Justices Marshall and Barbour, whatever may be the scope of the Commerce Clause authority under our Constitution, it is not so broad and far-reaching as to authorize the federal government to duplicate and apply at the state level, the traditional regulatory activities of state governments and thereby substantially to displace state governments in their fundamental functions involving state controls over the use of private lands within their territories. The federal power to regulate commerce between the states is not the authority to police land use within the state.

The *amici* urge this Court that when Constitutional practice has assigned some defined governmental function to the states (in the case at bar, the authority to control and police the use of lands) and that practice is harmonious with the Constitution's enumerated powers of the central government, then that authority under the Tenth Amendment has been reserved to the states and not to Congress. Land-use regulation is such a function. When Congress unreasonably or uncaringly impedes a state government's ability to carry out such a responsibility, Congress is exercising nondelegated powers and violating the Tenth Amendment principle of reservation to the states. And finally, the *amici* urge, that as in this case, Congress' interference is *prima facie* unreasonable if conditions are such that Congress may not be held accountable to the electorate for the consequences of its acts.

The organizing principles implicit in the federal system and compelled by the Constitution contemplate a separation between and an accountability for the exercise of federal and state powers. Certain powers such as the police powers are reserved to the states and are available to states to be exercised as a service to its citizens and a means to realize conditions of social justice in that state. Congress may not act so as to impair critically the ability of states to utilize such authorities; nor may Congress act to displace the exercise of such powers. The land-use control provisions embodied in the Act violate these principles. They are not within the powers delegated to Congress. For these reasons, the decision of the court below should be affirmed.

CONCLUSION

The immediate aim of this *amicus curiae* brief is, for the reasons alluded to earlier, to urge that the decisions of the District Court be affirmed. But it is also the desire and intent of the *amici* to place this controversy into a larger context and thereby to alert this Court as to its implications for the future effectiveness of state and local governments specifically, and the operation of our federal system as well. In the view of the *amici* the significance of the case at bar lies less in what it portends for federal control of surface mining than its potentials for undermining the efficacy of state governments and our traditional methods of governance.

The features of the statutory arrangement before this Court are by no means unique. They are characteristic of an emerging new federalism in which states are relegated to the role of creatures of the national government. By means of this Act and other statutes with similar attributes, Congress apparently seeks to pre-empt and utilize the structures and authorities of state governments and thereby to convert heretofore sovereign entities to the status of instruments (albeit unwilling agents as the Indiana legislature declared) of the federal government. All this is done in the interests of Congressionally mandated federal policies, federal standards and federal choices and aims. In so doing, Congress appears heedless of the legal constraints represented by Constitutionally mandated concepts of federalism and of state autonomy and sovereignty. It also seems careless of the advantages of the type of decentralized government that the Constitution contemplates, which benefits include enhanced opportunities for citizens to make individual choices and to participate as citizens in the responsive and accountable political processes which state and local governments represent. The United States is too big for a centralized

land-use planning and zoning program operated by the federal government out of Washington, D. C. This fact was recognized, of course, by the Founders when they established the form of decentralized government sanctioned by the Constitution.

The *amici* urge this Court that to permit the federal incursions into traditional state functions exemplified by Title V of the Act would be bad Constitutional law. But beyond the constraints of law, such federal raids on the responsibilities and functions of state and local governments produce a kind of ineffectual and unaccountable method of governance which portends serious functional and political difficulties for the federal system at large.

Stated very succinctly, it is the perception of the *amici* that the cumulative changes in our federal system over the past several decades have not adequately been guided or constrained by any ascertainable organizing principles whatsoever — Constitutional or otherwise. Consequently, in the view of the *amici*, the performance of our federal governmental system has suffered. It has become an increasingly dysfunctioned form of federalism. Among other obvious deficiencies, contemporary intergovernmental relations have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable.[1] In today's federal system, for inquiring citizens,

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[1] These conclusions are shared, among others, by the Advisory Commission on Intergovernmental Relations which is concluding a study in depth of the federal role in the federal system. For example:

> Over the past twenty years the federal role has become *bigger*, *broader*, and *deeper* — bigger within the federal system, in the size of its intergovernmental outlays, and in the number of grant programs; broader in its program and policy concerns; and deeper in its regulatory thrusts, preemption proclivities, and the wide range of subnational governments interacting directly with Washington. This is the broad summary

the answer grows more vague as to which level of government is responsible for what governmental activity or result.

It is not the aim of the *amici* to turn back the clock, to return to the precepts of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918) in lieu of the scope of *United States* v. *Darby*, *supra*. But this brief should be construed at least in part, as an attack on the legislative mode embodied in Title V of the Act. It is typically intrusive and coercive. It has been enacted, it seems, without a manifest concern for preserving the fundamental attributes of state sovereignty. It seeks without reservation to impose on the states the federal will and the federal standards without regard to costs or consequences to the states and the citizens of those states. The methods which Congress has chosen to pursue its federal interests is a bad method because, among other reasons, it displays a lack of appreciation for the need to protect and foster a federal system in which state governments retain their sovereign-

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conclusion that emerges from this ten volume study and it points to a growing centralization of policymaking. Yet, perhaps surprisingly, this conclusion does *not* produce a companion generalization that the system's *delivery of services* is infinitely more centralized than its predecessor of a generation ago. What *is* certain is that the current labyrinth of countless intergovernmental relationships — with their multiple vertical, diagonal, curving, and haphazardly horizontal connections — is far more dysfunctional than that of 1960.

The contrasts, then, between the "systems" of 1960 and 1980 are stark, but the continuities between them, along with perplexing paradoxes in both, leave us with an open debate over whether we still have a noncentralized system but with a general consensus that it does not function well. X ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth*, in AMERICAN FEDERALISM 1960-1980: CONTRASTS AND CONTINUITIES (A-86) (publication forthcoming U.S. Government Printing Office)

ty and thereby their ability to discharge their Constitutional responsibilities to their citizens within that system as originally contemplated by the Founders.

It is for these reasons that the *amici* suggest that the effectiveness of Congress, and the federal Executive Branch as well, would benefit if this Court were to elucidate in the context of the statutory method here under consideration, the limits of the Commerce Clause and the Constitutional constraints upon Congressional powers which in the past have decreed and protected the organizational attributes of the federal system. In the view of the *amici*, adherence to these principles is necessary if the federal system is to continue to work effectively in the interests of all the people. The workability of the federal system is the ultimate issue before this Court. The *amici* urge that the decisions of the court below be affirmed.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona

ROBERT T. STEPHAN
Attorney General
BRUCE EUGENE MILLER
Deputy Attorney General
State of Kansas

DAVID L. WILKINSON
Attorney General
State of Utah

ROSS D. DAVIS
DAVIS & SIMPICH
1301 Pennsylvania
Avenue, N.W.
Washington, D.C. 20004
(202) 833-3640

Attorney for National
League of Cities

Supreme Court, U.S.
FILED
JAN 12 1981

No. 80-231

In The

Supreme Court of the United States

October Term 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Appellant,

vs.

STATE OF INDIANA, INDIANA COAL ASSOCIATION, MEADOWLARK FARMS, INC., AMAX COAL COMPANY, PEABODY COAL COMPANY, AND JOHN A. CONLON,

Appellees.

On Appeal From The United States District Court For The Southern District Of Indiana

BRIEF FOR AMICUS CURIAE STATE OF IOWA IN SUPPORT OF THE STATE OF INDIANA, et al.

STATE OF IOWA

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH
Assistant Attorney General

Hoover State Office Building
Second Floor
Des Moines, Iowa 50319
(515) 281-5351

Attorneys for the Amicus

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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BRIEF FOR AMICUS CURIAE STATE OF IOWA IN SUPPORT OF THE STATE OF INDIANA, et al.

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of Iowa respectfully submits this brief as amicus curiae under the authority of Rule 36.4, United States Supreme Court Rules.

INTEREST OF THE AMICUS

The State of Iowa is directly interested in this Court's ruling on the constitutionality of the procedure for prepayment of civil penalties since the Department of Interior will seek to compel Iowa to institute such a procedure if its

constitutionality is upheld. The United States District Court for the Southern District of Iowa has temporarily enjoined enforcement of this provision in Iowa. *Star Coal Co. v. Andrus* (S. D. Iowa No. 79-171-2), Ruling on Motion for Preliminary Injunction (February 13, 1980), reported at 14 E. R. C. 1325 (1980) (appeal pending).

The Iowa legislature adopted a state surface mining act to meet the requirements for a state program under the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. 1201, *et seq.* (hereinafter SMCRA). Iowa's statute, enacted as chapter 29, Laws of 68th Iowa G. A. (1979 Sess.), does not require operators to pay proposed penalties into an escrow account prior to hearing. The Secretary of Interior issued a "Partial Approval/Partial Disapproval of the Permanent Program Submission from the State of Iowa" on October 16, 1980, in which he indicated that the State would be required to provide for prepayment of civil penalties if the injunction in *Star Coal Co. v. Andrus, supra,* were dissolved. 45 Fed. Reg. 68, 678 (1980). If the State program were disapproved, federal enforcement would replace state regulation of this industry under section 504(a), SMCRA, and the State would be ineligible for funding for abandoned mine reclamation under section 405(c), SMCRA. To avoid the threatened loss of state regulation, Iowa might be compelled to require prepayment of penalties as a prerequisite to administrative or judicial hearings. This compulsion on the State to require its citizens to pay penalties in advance of hearing in state tribunals directly impinges on the State's authority to conduct its own governmental functions.

> Congress may not exercise the power [the Commerce Clause] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

National League of Cities v. Usery, 426 U. S. 833, 855 (1976). The State is concerned that many future federal-state programs may similarly deprive the States of their authority to provide minimum procedural safeguards.

SUMMARY OF ARGUMENT

The government may not constitutionally charge one with a violation of law and then compel the advance payment of civil penalties as a precondition to a hearing. The risk of erroneous deprivation of property is high given the subjective criteria for penalty assessments. Not only does section 518(c) deny the right to a hearing for those who cannot afford to immediately pay but it has chilling effects on other fair hearing rights as well. This deliberate deprivation of property rights prior to a hearing serves no significant governmental purpose but instead imposes an impermissible burden on the right to a fair hearing.

ARGUMENT

I. Section 518 (c) of the Surface Mining Act, 30 U. S. C. § 1268 (c), violates the Due Process Clause of the Fifth Amendment by requiring payment of administratively-proposed civil penalties as a prerequisite to full administrative hearing.

Section 518(c), SMCRA, compels a miner to pay the full amount of a proposed penalty within thirty days of the issuance of an administratively proposed assessment. Although section 518(b) states that a civil penalty shall be assessed only after a full adjudicatory hearing conducted pursuant to 5 U. S. C. § 554, section 518(c) requires payment in advance of hearing and specifically states, "Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

The issue in this case is whether Congress may constitutionally condition the opportunity for either a hearing or judicial review to contest civil penalties upon prior immediate payment of the penalty proposed by the enforcing agency. There is clearly no waiver of the right to a prior hearing since the miner has absolutely no choice but to pay in order to have a hearing. *See Terral v. Burke Construction Co.*, 257 U. S. 529 (1922) (State cannot condition foreign corporation's right to do business on waiver of constitutional right to resort to federal court).

> Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

Garrity v. New Jersey, 385 U. S. 493, 498 (1967).

Amicus State of Iowa urges that requiring such payment as a precondition to receiving a hearing deprives persons assessed with civil penalties of their right to be heard in violation of due process clause of the Fifth Amendment. If due process means anything it means that "'Parties whose rights are to be affected are entitled to be heard. . . .' * * * It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Mango,* 380 U.S. 545, 552 (1965)). *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976).

The proper time for hearing is prior to the taking or deprivation of property or liberty. *Fuentes v. Shevin, supra,* 407 U.S. at 81-82. The Court has recognized that in certain exigent circumstances due process is not denied when notice and hearing are postponed and the government acts summarily. *North American Storage Co. v. Chicago,* 211 U.S. 306 (1907) (seizure of contaminated food to protect public health); *Coffin Bros. & Co. v. Bennett,* 277 U.S. 29 (1928) (bank failure); *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) (misbranded drugs); *Phillips v. Commissioner,* 283 U.S. 589 (1931) (collection of taxes); *United States v. Pfitsch,* 256 U.S. 547 (1921) (to aid in war effort); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (seizure for forfeiture of vessel carrying contraband). However, in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Court identified three factors to be considered in identifying what is required by due process:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous de-

> privation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The statute clearly deprives one of a property interest by compelling the payment of money. The escrow procedure also permanently deprives those who lack adequate liquid assets to pay in the short time provided of any right to a hearing. It is no answer that the statute requires a refund with interest (at the greater of 6 percent or current treasury rate) if the penalty is ultimately lowered. Even those who can afford to pay the proposed penalty will not be compensated for lost opportunities should the penalty be vacated. "This Court has not . . . embraced the general proposition that a wrong can be done if it can be undone." *Fuentes v. Shevin,* 407 U. S. 67, 82 (1972), quoting *Stanley v. Illinois,* 405 U. S. 645, 647.

The penalty prepayment procedure also directly discourages miners from challenging a notice of violation or an order for abatement issued under section 521(a)(3). Since the Secretary is required to consider the good faith of the person in attempting to achieve rapid compliance after notice of violation in setting a penalty, section 518 (a), and since the Secretary is required to assess the proposed penalty within thirty days of the notice of violation under section 518(c), a miner who decides to challenge an order of abatement must recognize that his challenge may affect the agency's contemporaneous decision whether to assess a penalty. The statute also creates a bureaucratic

incentive to reaffirm the agency's predetermined conclusions and to maximize the penalty to the operator. Without opportunity for input by the accused, the inherent human tendency will be for the agency to decide that its original determination of violation is correct. There is less chance it will err on the conservative side in proposing penalty amounts. The nature and purpose of penalties combined with the nature of the agency's function in assessing and enforcing them result in a bureaucratic incentive to maximize proposed penalties. It is also clear that under the statutory scheme it becomes increasingly difficult to exercise a party's "right" to an evidentiary hearing as proposed penalties increase. Thus the result may well be a reversal of the normal likelihood that higher penalties would tend to induce requests for hearings, and the agency would be able to discourage hearings by increasing proposed penalties. The final result is likely to be substantively affected even if a hearing is finally held. Clearly any administrative law judge will know that the amount has been proposed by the agency and paid in full into escrow or there would be no hearing. The decision will therefore be whether to modify the proposed penalty rather than what penalty would be independently appropriate after consideration of the evidence from all parties.

The risk of erroneous deprivation is high. If the prepayment is not made the statute denies all right to contest either the fact of violation or the amount of penalty. Any person unable to make the prepayment will be required, ultimately, to pay the full penalty, however wrongfully determined.

The fact that proposed penalties are also based on subjective determinations increases the risk of error.

Even the fact of violation is dependent upon observations of inspectors in the field. The statutory standards to be considered in determining the amount of a penalty are inevitably subjective:

> the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Section 518(a), 30 U. S. C. § 1268(a). These factors must be determined by evidentiary hearing to reduce the risk of error.

In other cases cited above in which a deprivation of property prior to final hearing was upheld there was always an overriding governmental necessity calling for expeditious action. These cases called for emergency action because later action would be impossible, fruitless or simply too late. No such necessity exists here. Prepayment of penalties does not prevent continuing environmental harm; that purpose is served by cessation orders under section 521(a)(2). Even the necessity of protecting the nation's revenue cannot be utilized in justifying the prepayment requirement. The penalty provision was not enacted as a revenue raising measure. Indeed, ideally, if there were complete compliance with the Act, it would raise no revenue at all. In fact the statute simply permits some persons to contest proposed penalties and others not—depending upon whether they can raise the funds in thirty days.

Less intrusive means exist to expedite the collection of penalties. Section 509 already requires operators to post bonds conditioned on compliance with the statute. Unlike taxation which is applicable to all, these penalties would be imposed on miners only, a relatively small group with sufficient capital investment that they are unlikely to remove all their property from the jurisdiction to avoid payment of penalties. Cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 676-80 (1974) (vessels subject to forfeiture might be removed from jurisdiction, preventing forfeiture proceedings). If the purpose is solely to increase the deterrent effect by causing greater economic harm at an earlier stage to all who may have violated the Act, such is a constitutionally impermissible objective. By analogy to criminal law, the increased deterrent effect of speedy punishment does not justify the elimination of procedural protections designed to distinguish those deserving of punishment from those who are not. In the taxation, forfeiture, and emergency action cases, governmental interests require the temporary deprivation of property interests prior to any hearing. In none of those situations did the government deliberately condition the right to a hearing on the prior deprivation of a property interest. *See Shapiro v. Thompson*, 394 U. S. 618, 630-631 (1968) (State may not impose residency requirement to deter right to travel).

> If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.
>
> • • •
>
> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the

> exercise of basic constitutional rights. Cf. United States v. Robel, 389 U. S. 258, 19 L. ed. 2d 508, 88 S. Ct. 419; Shelton v. Tucker, 364 U. S. 479, 488-489, 5 L. ed. 2d 231, 237-238, 81 S. Ct. 247. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

United States v. Jackson, 390 U. S. 570, 582 (1968).

CONCLUSION

In summary none of the three *Eldridge* factors would allow the penalty scheme in the statute. The private interest is great. There is no overriding governmental necessity or need. The risk of erroneous deprivation is potentially great. This is the very type of determination in which fundamental fairness—due process—demands that an individual about to be penalized should have an opportunity to participate *prior* to deprivation. Indeed, even in cases where this Court has allowed something less than a full hearing *prior* to the deprivation at some point in time the individual has had an opportunity for that hearing. Under Section 518 (c), 30 U. S. C. § 1268 (c) there may often be a denial of any hearing right at all rather than mere postponement. Amicus State of Iowa urges the Court to affirm the holding of the court below that Section

518 (c) violates the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH
Assistant Attorney General

Hoover State Office Building
Second Floor
Des Moines, Iowa 50319
(515) 281-5351

Attorneys for the Amicus

No. 80-231

Supreme Court, U. S.
FILED
JAN 9 1981
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1980

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Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE

STEPHEN H. SACHS
Attorney General
THOMAS A. DEMING
Assistant Attorney General
MICHAEL J. SCIBINICO, II
Assistant Attorney General
Department of Natural Resources
Tawes State Office Building
Annapolis, Maryland 21401
(301) 269-2251

The Daily Record Co., Baltimore, MD 21202

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Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975) 16

Constitution, Statutes and Regulations

United States Constitution:

Article I, Section 8 (Commerce Clause) *passium*

Fifth Amendment ..... *passium*

Tenth Amendment ..... *passium*

Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164), 92 Stat. 1290 [30 U.S.C. § 801 et seq.] 19

Occupational Safety and Health Act of 1970 (Pub. L. 91-596), 84 Stat. 1590 [29 U.S.C. § 651 et seq.] 19

Surface Mining Control and Reclamation Act of 1977, (Pub. L. 95-87), 91 Stat. 447:

§ 101(b) [30 U.S.C. § 1201(b)] 10

§ 509 [30 U.S.C. § 1259] 23

§ 510(c) [30 U.S.C. § 1260(c)] 23

§ 510(d) (1) [30 U.S.C. § 1260(d) (1)] 14

§ 515(b) (2) [30 U.S.C. § 1265(b) (2)] 13

§ 518(a) [30 U.S.C. § 1268(a)] 22, 25

§ 518(c) [30 U.S.C. § 1268(c)] 8, 20, 1a

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§ 522(a), (c), (d), (e) (4) & (5) [30 U.S.C. § 1272(a), (c), (d), (e) (4) & (5)] 16
§ 522(b) (4) & (5) and (e) (1), (2), (3) 16
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Laws of Maryland, Chapter 740 (1980) 3
Maryland Annotated Code, Natural Resources Article, § 7-505(b) (2) (v) & (vi) 2, 3, 4
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30 C.F.R. § 732.15(b) (7) 24
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30 C.F.R. § 785.17(d) (1) 14
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30 C.F.R. § 845.18 24

Miscellaneous

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No. 80-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Maryland is vitally interested in the instant proceeding before the Court, as well as the companion Virginia action on the same basic issues.[1] Maryland has regulated surface coal mining within its two westernmost counties since the industry began there in

[1] *Virginia Surface Mining and Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), probable jurisdiction noted, Nos. 79-1538 and 79-1596 (October 6, 1980). Hereinafter cited as *Virginia Surface Mining*.

the 1940's. The initial statute was passed as an emergency measure in a special session of the Legislature in November of 1947. Comprehensive permitting and bonding requirements have been imposed from the beginning, and the law has been updated on numerous occasions since that time.[2] The Maryland General Assembly thus has evidenced its strong intent to regulate the industry so as to ensure full environmental control over all operations.

The Maryland coal industry is comparatively small on the national scale. However, the industry is important to the western Maryland counties, as it is typically in the Appalachian Mountain area. For calendar year 1979, over one thousand people were employed in Maryland directly in coal production.[3] In Garrett County, out of an estimated total population of 26,400 persons, 813 were employed in coal mining.[4] Over two million net tons of coal were produced in western Maryland in 1979[5] mostly by small operations.[6]

Maryland believes that surface mining in the State can be regulated effectively without causing small operators to go out of business, and believes further that the State government, rather than the federal government, is best able to accomplish this goal. Accordingly, the state has

[2] Maryland's statutes relative to surface coal mining are now codified as Natural Resources Article, Title 7, Subtitle 5, Md. Ann. Code.

[3] Fifty-Seventh Annual Report of the Maryland Bureau of Mines, page 4. Total employment of 1,097 persons; not including office, supervisory personnel, or independent truck haulers. Surface mining accounts for 65% of the total figure.

[4] Annual Report, page 4. Total population from Maryland Manual 1979-1980, page 484, issued by the Secretary of State.

[5] Annual Report, page 4. Total net tonnage of 2.7 million, 1.8 of which was taken by surface mining methods.

[6] Annual Report, pp. 6-13. Many permit holders in Maryland employ less than 5 individuals, and most employ under 15 employees. Few permit areas are greater than 40 acres, and over 100 strip mining permits were involved in the production of the 1.8 million tons noted above.

applied for and obtained "conditional" approval of a permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (hereinafter "SMCRA" or "the Act").[7] However, in so doing, Maryland has been required to comport its laws and regulations precisely to the provisions of SMCRA, and corresponding regulations promulgated by the Secretary of the U.S. Department of Interior. As indicated in this brief amicus curiae, Maryland believes not only that several of these requirements are inappropriate in this state, but that the federal government lacks Constitutional authority to impose them under penalty of preemption. It would appear that the Constitutional questions of concern to Maryland will be addressed by this Court in the present action, and in the *Virginia Surface Mining* case.

The Secretary of the Interior has demonstrated little or no regard for state judgment during the program approval process. For example, Maryland strongly objected to the absolute prohibitions on mining in certain areas required by SMCRA, § 522(e)(5) [30 U.S.C. § 1272(e)(5)]. For reasons more fully discussed in § II below, the State finds these prohibitions irrational in the absence of case-by-case review. Rather than file suit immediately, Maryland first proposed a means to cure these problems, by insertion of a general waiver provision.[8] This approach was totally rejected by the Secretary, with no supporting rationale, and the approval of the Maryland SMCRA Program is

[7] See, *Conditional Approval of Permanent Program Submission from the State of Maryland Under the Surface Mining Control and Reclamation Act of 1977*, 45 Federal Register 79430-79451 (December 1, 1980).

[8] 1980 Laws of Maryland, Chapter 740 enacted the prohibitions but allowed a waiver if mining was "approved by the owner or the appropriate jurisdictional agency, and the Department [of Natural Resources]." Natural Resources Article, § 7-505(b) (2) (v) and (vi), of the Annotated Code of Maryland.

currently conditioned, *inter alia*, upon further legislation to remove this waiver.[9]

Similarly, due to the large proportion of small operators in Maryland, the civil penalty prepayment requirement discussed in § III below will constitute a substantial hardship in this state. A small business with fewer than five employees rarely would have sufficient, excess working capital to be able to place the penalty amount into escrow while contesting enforcement actions. However, the Secretary has never relaxed his position that the SMCRA escrow provision must be contained in the Maryland Statute.[10] This provision has been enacted into law in Maryland, but the enactment was accompanied by advice of the Attorney General that the escrow requirement most likely is unconstitutional.[11]

Maryland is also concerned that the prime farmland provisions of SMCRA may adversely impact the industry. These provisions require that, if prime farmland is removed by surface mining, then upon restoration the area must be used again for crop production of equal or greater yield. In conjunction with the interim SMCRA program in Maryland, it has been determined that approximately 20,000 acres of potential prime farmland exist in Garrett County; with 9,000 acres in Allegany County.[12] Given the

[9] *Conditional Approval*, ibid n.6, Finding 12.1. As grounds for this condition, the Secretary states simply that "alternatives are not available to requirements of SMCRA."

[10] Maryland was apprised of this position from the start of the program development process, and consequently enacted the escrow provision in the 1980 Legislative Session, Chapter 740, § 7-517(b) (4) of the Natural Resources Article of the Annotated Code of Maryland.

[11] See, Letter of May 21, 1980 from Attorney General Stephen H. Sachs to Governor Harry Hughes, attached as Appendix A to this Brief, pp. 1a-3a.

[12] U.S. Department of Agriculture Soil Conservation Service Report entitled "Prime Farmlands of Garrett and Allegany Counties," prepared for the Maryland Bureau of Mines, April 1978.

totally inflexible SMCRA reclamation standard for such land, it is quite possible that the state's coal reserves under prime farmlands will not be recovered. As discussed in § I below, Maryland submits that the SMCRA prime farmland requirements are not within Congressional authority.

Maryland does not claim that the federal government has no legitimate interest in regulating many aspects of strip mining, particularly environmental impacts. However, SMCRA goes to remarkable extremes in attempting to dictate pure land use aspects once mining has ceased, and to absolutely prohibit strip mining in certain areas based on Congressional notions of public health and safety unrelated to interstate commerce. Provisions for prepayment of civil penalties are harsh, redundant to bond requirements, and very questionable in terms of due process. Implementation of these provisions is forced on the states under penalty of preemption, with no latitude for state discretion based on knowledge of particular local conditions. In so doing, this Act directly usurps traditional powers reserved to the states under the Tenth Amendment.

The State of Maryland believes that Congress has in this instance clearly overstepped its boundaries in our system of government. If SMCRA is allowed to stand as enacted, clear precedent will be established allowing almost any aspect of state sovereignty to be overridden upon the smallest Congressional finding, supportable or not, that interstate commerce is marginally involved. In this context, the interest of Maryland here goes beyond any particular impact on the state's mining industry. Maryland believes that this case raises basic questions of the remaining scope of state authority in our federal system. We sincerely urge this Court to firmly rule against these particular intrusions into state autonomy,

and generally to affirm the limits of Congressional authority.

SUMMARY OF ARGUMENT

Maryland urges affirmance of the District Court decision in the instant case, as well as the decision of the United States District Court for the Western District of Virginia in *Virginia Surface Mining and Reclamation Association v. Andrus*. In support of its position, Maryland respectfully submits that provisions of SMCRA properly were held unconstitutional, as follows:

Post-Mining Land Use

SMCRA contains many provisions which mandate specific uses of restored lands for at least five years after all coal removal. This has nothing to do with environmental control of strip mining. Congress has simply decreed that land, once strip mined, must be returned to an equal or better economic use. In the case of prime farmland, the use must be prime farmland and nothing else, possibly for a ten year period after mining.

The State of Maryland submits that Congress has no authority under the Commerce Clause to order that private property be used for farming, whether it has been strip mined or not, or that any other particular land use must occur after strip mining. After removal of coal and restoration of the land, the only interstate concerns stemming from the fact that strip mining once occurred on a piece of property are the residual environmental problems from the activity (acid run-off, to name the most often cited danger). Only provisions rationally related to these concerns may be enacted under the Commerce Clause. Furthermore, if the Tenth Amendment holds any remaining vitality, then the property owner must be able to employ the land according to agricultural, commercial, residential or whatever other uses are permitted under

state or local zoning authority. These choices may not be assumed by Congress.

Absolute Prohibitions on Mining

SMCRA provides that under no circumstances may mining occur "within 300 feet of any public building, school, church, community or institutional building, public park, or within 100 feet of a cemetery" § 522(e)(5) [30 U.S.C. § 1272(e)(5)]. The restriction applies even if the church, school, or other entity owns the property involved and wishes to mine it. No waiver is permitted, and the State of Maryland has been told expressly to eliminate its statutory waiver provision in this area as a condition of federal approval of the State SMCRA Program.

Maryland submits that there is no basis in the Commerce Clause for Congress to prevent a church from mining on its own property, or to require states to implement such an irrational provision under penalty of preemption of state authority over all aspects of strip mining. Furthermore, by enactment of this provision, Congress has invaded an area of traditional State authority over the health and welfare of its citizens, thereby overstepping the bounds of Congressional authority established by the Tenth Amendment.

Civil Penalty Prepayment

Finally, SMCRA contains an enforcement provision that requires full prepayment of a proposed penalty into escrow as a condition precedent to contesting either the penalty amount or the underlying violation of a citation. Maryland urges affirmance of the District Court decision in this action that the escrow requirement violates the procedural due process guarantees of the Fifth Amendment.

From a practical standpoint, there is no justification whatsoever for civil penalty prepayment by strip mine

operators. Since all permits are fully bonded, there can be no concern over collection of final assessments. Refusal to pay would simply lead to permit revocation and forfeiture of a far greater amount of money, plus loss of the right to engage in future mining activities. Thus, Congress can show no government interest at stake here, and the escrow requirement should be rejected even if the due process concerns were considered to be minimal.

In fact, this prepayment scheme is a substantial intrusion under the Fifth Amendment. There can be no dispute that property is actually taken in these circumstances, and it is no answer to point to the possible return of the escrow payment "with interest" (at 6% or the prevailing Treasury rate). Cash flow is an important factor in any business, and in many instances operators may be forced to borrow money in order to contest a violation. Given the prime interest rate at the date of this Brief (20% and climbing), the escrow requirement is clearly illuminated for what it is, a gross and substantial deprivation of property.

Under the Act, failure to place the entire amount of a proposed penalty into escrow results "in a waiver of all legal rights to contest the violation or the amount of the penalty" § 518(c) [30 U.S.C. § 1268(c)]. The Act itself contains no requirement for any type of hearing prior to payment. Maryland submits that there is patently no government interest served by such a taking prior to a hearing, and that the escrow requirement of SMCRA should be struck by this Court as a violation of the due process standards of the Fifth Amendment.

ARGUMENT

I.

THOSE SECTIONS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 WHICH ATTEMPT TO REGULATE POST-MINING LAND USE ASPECTS UNRELATED TO ENVIRONMENTAL CONTROL ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT.

At one time, it could be firmly stated that the power of Congress to act under the Commerce Clause of the United States Constitution extended only to actual interstate activities, and not the means of producing goods which were intended for such commerce. Production was not commerce and, more specifically to this case, the mining of coal was held not to be interstate commerce. *Kidd v. Pearson,* 128 U.S. 1 (1888); *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1921); *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1922); *Carter v. Carter Coal Co.,* 298 U.S. 238 (1935). The more modern analysis of Commerce Clause authority began when this Court shifted its focus to whether the activity which Congress desired to regulate affected interstate commerce in a direct or indirect manner. *Schecter Poultry Corp. v. U.S.,* 295 U.S. 495 (1934). Next, the inquiry was said to be whether a close and substantial relation to interstate commerce existed such that control was needed to protect commerce from burdens and obstructions. *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1936). Following some further refinement, *U.S. v. Darby,* 312 U.S. 100 (1940), a simple "rational basis" test finally was adopted as the basis for a proper exercise of the Commerce Clause power. *Wickard v. Filburn,* 317 U.S. 111 (1942). It is fair to say that this test still persists today, and that a federal statute may be sustained under the Commerce Clause if there is a "rational basis" for a finding by Congress that the regulated activity affects interstate commerce, and

"reasonable" or "rational" means have been selected for its regulation. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964); *Katzenbach v. McClung,* 379 U.S. 294, 303-304 (1964).

Despite such broadened deference for Congressional authority under the Commerce Clause, the State of Maryland urges that the rational basis test still represents an enforceable limit to Congressional authority. The Surface Mining Control and Reclamation Act of 1977 violates this limit in several of its provisions which attempt to regulate land use. Maryland would submit in the alternative that even if the SMCRA provisions can be sustained under a pure Commerce Clause analysis, Congress has exceeded the Tenth Amendment limits upon its authority to intrude into areas of state sovereignty, recognized by this Court in *National League of Cities v. Usery,* 426 U.S. 833 (1976).

A. Once mining is completed, the sole rational basis for Commerce Clause jurisdiction lies in environmental impacts on interstate commerce.

As noted in the federal Government's Brief in *Virginia Surface Mining,* the primary rational basis for the Act is to control environmental hazards from strip mining. (Br. pp. 24-25.) The mining of coal is, of course, also identified as a significant contributor to the Nation's energy requirements, § 101(b) [30 U.S.C. § 1201(b)]. However, the negative environmental factors are the focus of the statute; the law is not an effort to promote coal production.

Maryland submits that once mining is completed on a particular permit area, the only remaining effect of the mined lands on interstate commerce is continued environmental impact resulting from changes in the land due to the mining operation. Under the most liberal interpretation, the land is no longer being used in any manner

related to economic aspects of commerce. Thus, unless the fact that land was once used for such purposes is sufficient, there is no basis for continued Commerce Clause jurisdiction to protect the free flow of goods.

In its Brief in this appeal, the federal Government asserts that, aside from adverse environmental effects, there are at least two other separate and independent grounds for SMCRA Commerce Clause jurisdiction. Quoting from pp. 12-13 of the Brief:

> First, because coal produced from surface mines is a commodity sold in interstate commerce, Congress may act under the Commerce Clause to regulate the conditions under which that commodity is produced. *United States v. Darby,* 312 U. S. 100, 115, 122 (1941).
>
> Second, because surface coal mining operations adversely affect interstate commerce in agricultural products and other commodities by diminishing land productivity, Congress may exercise the Commerce Clause to protect those aspects of interstate commerce. See *Heart of Atlanta Motel, Inc., v. United States,* 379 U.S. 241, 256-257 (1964).

Maryland submits that these suggested Commerce Clause grounds would, if sustained by this Court, virtually eliminate any present restraint on Congressional authority under the Commerce Clause.

The first ground is basically a self-serving restatement of the evolved test for Commerce Clause jurisdiction, absent the requirement that a rational basis must exist between the identified impact on commerce, and the means chosen to regulate it. *Katzenbach v. McClung, supra.* However, this basis for Congressional authority fails once mining is completed. After the coal has entered interstate commerce, its continued status as a commercial commodity can no longer rationally support Congressional authority over the land which originally produced it.

The second ground proposed by Appellant would constitute a vast expansion of even the current liberal test for Commerce Clause jurisdiction. In essence, it suggests that Congress may regulate any activity that reduces or impairs land productivity. Following the logic of the Government's Brief at pp. 12-16, it is implied that Congress could have banned strip mining entirely on farmland simply upon a finding that some loss of crop productivity results from surface coal mining operations. Of course, SMCRA does not do this but, according to Appellants, it does "[balance] the competing interests of agriculture and surface coal mining . . . ." Brief p. 16. In other words, Appellants argue, Congress has the power to decide that a landowner, once engaged in farming, may not switch to surface coal mining unless he can guarantee that the full crop potential of the land will be restored.[13]

State and local zoning decisions now control whether land is used for industrial, agricultural, commercial, residential, recreational or other purposes. A change from one type of zoning to another may often favor one type of interstate commerce over another. However, if this choice alone establishes Congressional authority under the Commerce Clause then there is little if any state action not within the preemptive power of the federal government. Maryland respectfully submits that this Court should soundly reject any such expansion of Congressional authority.

[13] Of course, the unknown factor is for whose benefit the land is being restored for farming. Neither Congress nor the states can force the landowner to actually resume farming. Thus, he could simply wait for whatever period SMCRA requires, and then execute his intended use for the property. Or, worse for the country, he might not allow the coal on his property to be mined due to the resulting loss of control over the use of his land.

B. Many of the SMCRA post-mining land use requirements bear no relation to environmental protection, and are therefore invalid as not rationally adapted to the sole basis for Commerce Clause jurisdiction during this period.

In a general sense, environmental protection concerns related to strip mining deal with control of water pollution during the mining operation, restoration of the land to its original contour, reseeding and revegetating, and prevention of any future surface or subsurface adverse effects on water. Many SMCRA provisions properly address these concerns. However, there are several provisions throughout the Act which dictate actual land use during the term after mining in which regulatory authorities will determine whether proper reclamation has been accomplished. The District Courts, in this action and in *Virginia Surface Mining,* have identified several provisions of the Act which are invalid for this reason. Maryland would emphasize the following two sections as illustrative of the constitutional infirmity.

First, the Act establishes land use per se as a specific performance standard, § 515(b)(2) [30 U.S.C. § 1265(b)(2)]. Although contained in a section entitled "Environmental Protection Performance Standards", it is obvious on the face of the statute that the land use standard is totally unrelated to environmental protection. The actual text provides as follows:

> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to
>
> * * * * * *
>
> (2) restore the land affected to a condition capable of supporting the use which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long

> as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicant declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of federal, state, or local law.

Second, in the case of prime farmland, the focus on land use control is even more specific. The post-mining land use can only be cropland, and equivalent or higher levels of yield must be obtained. This is based on § 510(d) of the Act [30 U.S.C. § 1260(d)] which provides as follows:

> (d)(1) In addition . . ., if the area proposed to be mined contains prime farmland . . . the regulatory authority shall . . . grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area, under equivalent levels of management. . . .

Federal regulations on this point leave no room for flexibility, and have been sustained by the United States District Court for the District of Columbia in the consolidated review of all SMCRA regulations.[14] It is doubtful that any case can be made for demanding that cropland, once mined, must be used again as cropland in order to control interstate environmental impacts from the mining

[14] 30 C.F.R. § 785.17(d) (1), 44 Federal Register 15374 (March 13, 1979). The regulations state simply that "the approved proposed postmining land use of these prime farmlands will be cropland." As held by Judge Flannery in reviewing this requirement in *In Re Permanent Surface Mining Regulation Litigation,* Civil Action No. 79-1144 (D.D.C. May 16, 1980), Slip. Op. at p. 5:

> "Section 510(d) (1) corroborates the imposition of an additional requirement for mining on prime farmland: the land must be reclaimed and used as crop land."

operation.[15] Thus, there is no rational connection from this provision to the basis for Commerce Clause jurisdiction once mining activities have been completed.

The State of Maryland submits that these provisions, as well as the others identified by the District Courts, are not reasonably related to the prevention of environmental effects after the conclusion of mining operations. Although it may be reasonable to inquire into the intended post-mining land use of strip mined area so as to determine whether any such use might act to frustrate or impede environmental protections measures, it is not within the authority of Congress under the Commerce Clause to require specific land uses as conditions precedent to obtaining a strip mining permit.

C. The SMCRA post-mining land use requirements, even if within the Commerce power, are violative of the Tenth Amendment as impairments on an attribute of State sovereignty.

The landmark case of *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), holds that Commerce Clause authority, if available, may not be exercised by Congress in a manner so as to impair attributes of state sovereignty. Land use planning and control is such an attribute of state sovereignty.

As discussed above, if Congress need only point to the loss of a particular type of commerce, due to a zoning decision for example, to justify federal regulation, then there is no practical limit to Commerce Clause jurisdiction. Maryland submits that the Constitution does not allow such an expansion of the Commerce Clause per se, but that in any case, the Tenth Amendment stands as a

[15] If anything, the opposite is true. As specifically held by the District Court in this action, the prime farmland provisions actually increase water pollution. Finding No. 8, J.S. App. at 16a.

bar to federal intrusion into pure land use decisions, regardless of their indirect relation to commerce.

Land use planning and control is the means by which states and local communities decide the nature of their participation in our society: industrial or agricultural; high or low population density; and hundreds of other decisions on the basic character of an area. These decisions, virtually by definition, result in changes to an area's impact on interstate commerce. If Congress can decide that, for example, once a community is devoted to farming it may not change since that would cause a drop in agricultural productivity, then the federal government is directly dictating how the people in that community must make their living. Maryland submits that under our system of government, such power is reserved solely to states and local authorities who must daily answer to the citizens they govern. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). The wisdom of this approach is obvious, and should not be departed from in the name of strip mine control, or any other particular problem.

II.

THE SMCRA ABSOLUTE PROHIBITIONS ON SURFACE COAL MINING ARE NOT WITHIN THE COMMERCE CLAUSE AUTHORITY OF CONGRESS, AND ARE VIOLATIVE OF THE TENTH AMENDMENT.

A major feature of the Surface Mining Control and Reclamation Act of 1977 is the designation of certain areas as "unsuitable for surface coal mining", in which surface mining operations are banned outright, § 522 [30 U.S.C. § 1272]. As held by the District Court, where this section is addressed to non-federal lands, it is outside of the Commerce Clause and violates the Tenth Amendment.[16]

[16] Slip Opinion, pages 2 and 16 (J.S. App. 47a). Stricken provisions are §§ 522(a), (c), (d), (e) (4) and (5) [30 U.S.C. §§ 1272(a), (c), (d), (e) (4) and (5)]. Sections 522(b) and (e) (1), (2) & (3) deal with federal lands or federally designated Parks, Wildlife Areas, Trails, Wild and Scenic Rivers, and Historic Sites.

While urging this Court to affirm the District Court's decision in its entirety, Maryland would emphasize the particular constitutional problems found in § 522(e)(5).

Subsection (e)(5) contains per se, absolute prohibitions on surface coal mining. The full text of the statute is as follows:

> (e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—
>
> * * * * * *
>
> (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

From a policy standpoint, Maryland has no objection to the right granted here for a property owner to prevent or allow mining within 300 feet of his dwelling (although this grant is no more within the power of Congress than are the prohibitions in the remainder of the subsection, for the same reasons as discussed below). Maryland strongly objects to the absolute prohibitions in § 522(e)(5). As indicated in the Statement of Interest, Maryland first tried to temper them by insertion of a general waiver. However, this approach was rejected by the federal Office of Surface Mining.

Maryland submits that the absolute prohibitions on mining in SMCRA § 522(e)(5) are not rationally related to interstate commerce, and that Congress therefore may not preempt the state's control over strip mining for failure to enact these provisions. The Secretary offers no argument to the contrary here, and states only that "[the prohibitions] are plainly directed toward the purpose of ensuring that the extraction of coal does not endanger life and

property in mining communities." (Br. p. 19). This is not a basis for Commerce Clause jurisdiction. *Wickard v. Filburn, supra.* Furthermore, the means selected here are not rationally adapted to the identified problem. *Heart of Atlanta, supra.*

A 300 foot buffer zone may offer some protection in some circumstances, but why should a dwelling owner be able to waive this requirement when a church or park may not. Schools may not be open in the summertime, yet the SMCRA prohibition still holds. Under OSM regulations, "community or institutional buildings" include power plants, water supply and sewage treatment buildings, and historic buildings. 30 C.F.R. § 761.5(d), 44 Federal Register 15342 (March 13, 1979). None of these may waive the restriction, even if the buffer zone is owned by the party itself. A cemetery may be long abandoned, or may have its own internal buffer zone, but these factors are not allowed to be considered by a state permitting agency. In short, there is no ability to make an informed decision on the actual need for safety-related permit conditions in particular circumstances. In some cases, more than 300 feet may be required. Other circumstances may require no setbacks; simple time-of-day or time-of-year restrictions may suffice. Maryland submits that such decisions must be made on a case by case basis, and that the absolute prohibitions of SMCRA § 522(e)(5) fail the test of rationality even assuming, *arguendo,* that such areas of regulation are within Congressional authority.

For similar reasons as discussed above, the SMCRA absolute prohibitions should also be considered violative of the Tenth Amendment. The aspect of state sovereignity being intruded upon here is the basic state authority over the health and welfare of its citizens. Maryland submits that there is no state attribute more fundamental, and that any Congressional action taken purportedly under

the Commerce Clause may not usurp this function without clear and compelling grounds rooted in interstate commerce. There are no such grounds for the SMCRA § 522(e)(5) absolute prohibitions.

As shown by the lack of arguments on this point in the Secretary's Brief, there is really nothing that can be said for § 522(e)(5) except that it is obviously aimed at protecting life and property. (Br. p. 19). However, this section is not related to the life and property of the people actually engaged in surface coal mining.[17] It is aimed at bystanders, many of whom might wish to be involved and would profit from the operation.[18] Maryland submits that, to the extent such people need to be protected from themselves by appropriate safety regulations, such actions are peculiarly within state authority under the Tenth Amendment. As in the case of land use decisions, the wisdom of this approach is simply and clearly to leave basic health and safety decisions in the hands of those elected officials who must daily answer to the people they govern.

[17] Admittedly, Congress may have some authority over the health and safety of people producing products that enter interstate commerce. See generally, *Federal Mine Safety and Health Act of 1977*, Pub.L.No. 95-164, 91 Stat. 1290-[30 U.S.C. § 801 et seq]; and *Occupational Safety and Health Act of 1970*, Pub. L. No. 91-596, 84 Stat. 1590 [29 U.S.C. § 651 et seq].

[18] As to those unwilling bystanders, there is little if any connection between these people and interstate commerce so as to sustain the Congressional action here in any balancing of the federal and state interests involved. Simply being in the vicinity of an activity related to interstate commerce is obviously not sufficient to override the Tenth Amendment.

III.

FIFTH AMENDMENT DUE PROCESS IS VIOLATED BY THE CIVIL PENALTY PROVISION OF SMCRA WHICH REQUIRES THAT ALL PROPOSED ASSESSMENTS BE PREPAID IN ESCROW AS A CONDITION PRECEDENT TO CONTESTING EITHER THE PENALTY AMOUNT OR THE UNDERLYING VIOLATION OF A CITATION.

Maryland does not challenge the authority of Congress to employ civil penalty provisions in conjunction with enforcement actions under the Surface Mining Control and Reclamation Act of 1977. The basic SMCRA requirements here are quite similar to those used in other environmental statutes such as the Clean Air Act and the Clean Water Act. However, SMCRA contains a unique and important additional requirement: any civil penalty proposed by an administrative agency in conjunction with an enforcement action must be prepaid in full by the operator as a condition precedent to challenging the penalty amount or the underlying violation. Section 518(c) [30 U.S.C. § 1268(c)]. Maryland is aware of no precedent for this requirement.

The statute itself contains no provision for any type of hearing prior to the necessity to prepay civil penalty assessments as a condition of challenging the enforcement action. Obviously, this raises important questions of procedural due process under the Fifth Amendment of the Constitution. To date, all courts that have considered this issue have rejected the SMCRA provision on this ground.[19]

The present test for validity of such provisions involves a balancing of the government interest involved versus the private interest affected. *Matthews v. Eldridge*, 424 U.S. 319 (1975). As discussed below, Maryland submits that the SMCRA escrow prepayment requirement is totally incap-

[19] *Star Coal Co. v. Andrus*, Civ. 79-171-2 (S.D. Iowa, Feb. 13, 1980) Slip Op. 18-19, appeal pending, No. 80-49; and *Virginia Surface Mining*.

able of satisfying this test, and should be rejected by this Court as a clear violation of the Fifth Amendment.

A. The escrow provision constitutes a substantial deprivation of private property.

It cannot be disputed that the private interests involved here are deprivations of property protected by the Fifth Amendment. Monetary takings prior to a hearing have constituted the larger majority of the cases decided under the principles at issue here.[20] In the circumstances of SMCRA civil penalty prepayments, at least three substantial impacts are possible.

First, at a minimum, even if an operator is successful in challenging a civil penalty assessment, the law acts to deprive him of the use of his money for a significant period of time. It is no answer to point to the possible return of the escrow payment "with interest" (at 6% or the prevailing Treasury rate). The need for working capital is a basic requirement for efficient operation of any business. In a state such as Maryland, where many operations are small businesses, the prepayment requirement is an obvious substantial hardship. In the case of *Fuentes v. Shevin,*[21] this Court held that the Fifth Amendment right to be heard exists prior to even a temporary, non-final deprivation of property. At its best, the SMCRA escrow prepay-

[20] *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) (garnishment of wages without prior hearing held unconstitutional); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (termination of welfare benefits without prior hearing held unconstitutional); *Matthews v. Eldridge,* 424 U.S. 319 (1975) (termination of disability benefits requires prior hearing — but not necessarily a full evidentiary hearing).

[21] 407 U.S. 67, 88 (1972). Replevin of household goods for default of installment payments. Creditor was allowed to take possession solely on his assertion of non-payment, backed by a bond. Fact that goods would be returned if claim was invalid held irrelevant to Fifth Amendment hearing requirement.

ment scheme falls squarely within this holding, and should be invalidated.[22]

Second, in addition to the automatic temporary deprivation, the magnitude of SMCRA civil penalties makes it clear that small operators may be forced to borrow money in order to make escrow prepayments so as to challenge violations.[23] Given the prime interest rate at the date of this Brief (20% and climbing), there can be no doubt that the requirement to prepay proposed assessments can result in a permanent deprivation of a company's assets. Maryland submits that this is undeniably an effect prohibited by the Fifth Amendment in the absence of a prior hearing.

Third, in some circumstances, it is possible for the escrow prepayment requirement to result in the closing of a mine. Although a mine operator may be convinced that he has been improperly cited for a violation of the Act, he may be unable to prepay the assessments resulting from continued operation past a compliance deadline (basic assessment plus minimum of $750.00 per day mandatory penalty after deadline). If the disputed violation relates to the basic method of operation on the permit area, there is no option but to cease mining until resolution of the legal

[22] Maryland is incredulous at the statement in Appellant's Brief on page 70 that: "The 'refund-with-interest' provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury." If all the government need do is pay interest, then the Fifth Amendment has indeed lost its effectiveness.

[23] SMCRA civil penalties may range up to $5,000 per violation, with each day of continuing violation being deemed a separate violation § 518(a) [30 U.S.C. § 1268(a)]. The federal Office of Surface Mining itself has indicated that the average penalty per violation is approximately $2,000.00, and that the $750.00 per day penalty once a deadline for compliance has passed can result "in clearly excessive amounts considering the nature and effects of the underlying violations of the Act" 45 Fed. Reg. 5540 (Jan. 23, 1980).

issues. In this regard, the civil penalty prepayment scheme shows a clear potential for drastic consequences.

This scenario is not hypothetical, but actually occurred to the Black Creek Mining Company of Norton, Virginia, as described by Judge Williams in striking the provision at issue here in the companion case of *Virginia Surface Mining*, J.S. App. 69a-70a. Given this effect, Maryland submits that the escrow prepayment provision clearly involves substantial private interests under the Fifth Amendment.

B. There is no governmental interest served by the SMCRA civil penalty escrow provision.

In contrast to the private interests at stake, there are no governmental interests served by the escrow provision. The notion that prepayment is needed "to avoid the problem of non-collection of fines" is untenable in the context of a fully bonded strip mine operation.[24] As specifically required by SMCRA § 509 [30 U.S.C. § 1259] all permits must be backed by bonds or other security sufficient to complete properly the operation, but not less than $10,000. Thus, any failure to pay a final assessment would simply result in permit revocation and forfeiture of the outstanding security. A further consequence of forfeiture is disqualification for future mining permits. § 510(c) [30 U.S.C. § 1260(c)].

Given these protections, Maryland believes that the perceived need by Congress for prepayment of civil penalties could be rejected on its face by this Court. However, under any consideration, it is clear that the private interests impacted by this provision greatly out-

[24] Senate Report No. 95-128, 95th Cong., 1st Session, at page 59. Cited by Appellants in their Brief in *Virginia Surface Mining*, page 70, incorporated by reference into this action at page 36 of Appellants Brief.

weigh whatever strength lies in the government's concerns, and that the escrow provision fails the test of *Matthews v. Eldridge, supra,* for a valid taking of property without a hearing under the Fifth Amendment.

C. The informal "assessment conference" provided by the Office of Surface Mining does not substitute for the required Fifth Amendment hearing.

Although the Act itself contains no requirement for a hearing of any kind prior to prepayment of proposed penalties into escrow, the Secretary has attempted to cure the constitutional defect here by providing an "assessment conference" prior to payment.[25] Maryland doubts that agency regulations, as a general matter, are ever sufficient to moot a clear constitutional infirmity on the face of a statute. However, this issue need not be reached in the instant case since the adopted "assessment conference" would not be sufficient even if contained in the statute.

The basic Fifth Amendment right has been described as the right to be heard "at a meaningful time and in a meaningful manner." *Matthews, supra; Armstrong v. Manzo,* 380 U.S. 545 (1965). The "time" need only be before any deprivation, a test satisfied by the Secretary's assessment conference. However, the conference does not provide a hearing in a meaningful manner as required. At most, the conference represents an opportunity to argue for a lower assessment based on the rather exotic point system established under the regulations.[26] There is no independent, unbiased hearing examiner, and it is extremely doubtful that the assessment officer has the power

[25] 30 C.F.R. § 845.18; 44 Fed. Reg. 15463 (March 13, 1979).

[26] 30 C.F.R. § 845; 44 Fed. Reg. 15461 (March 13, 1979). OSM regulations which would have required states to use the same system have been remanded. § 732.15(b) (7) and § 840.13(a). *In Re Permanent Surface Mining Regulation Litigation,* Civil Action No. 79-1144 (D.D.C. 1980), 14 ERC 1083, 1089 (February 26, 1980), and Slip Opinion pp. 56-57 (May 16, 1980).

to reduce any proposed penalty to zero. Where a cessation order has been issued under § 521 of the Act [30 U.S.C. § 1271], some amount of civil penalty is mandated by § 518(a) [30 U.S.C. § 1268(a)]. Thus, in these instances, the Secretary cannot correct the statutory scheme of prepayment prior to an adjudication on the underlying violation.[27] In no case is a sufficient hearing held on the amount of a penalty without prepayment.[28]

In summary, there is no regulation or argument advanced by the Secretary which cures the basic violation of Fifth Amendment due process inherent in the SMCRA civil penalty prepayment requirement. All reviewing courts to date have stricken this novel provision on Fifth Amendment grounds, and this Court should affirm the District Courts' decisions on this issue.

---

[27] The Secretary argues that a hearing on the fact of a violation may be obtained under § 525 without regard to § 518 escrow prepayment (in apparent contradiction to the plain meaning of § 518(c)). *Virginia Surface Mining*, Br. pp. 68-69. This may be possible, but is strictly a matter of timing. Since proposed assessments are required by § 518(c) within 30 days of a notice or order, and prepayment within 30 days thereafter, a maximum of 60 days is available to adjudicate the violation. (The Secretary can issue a proposed assessment earlier than 30 days from the notice and thus shorten the period accordingly.) However, under § 525, the Secretary has 30 days to decide cases arising under cessation orders, and more if he grants temporary relief from the order. There are no deadlines for standard violation notices. In short, it is fair to assume that few operators will obtain a decision on an alleged violation prior to the deadline for escrow prepayment of a proposed civil penalty.

[28] On page 69 of the Secretary's Brief in *Virginia Surface Mining*, it is expressly acknowledged that:

> Accordingly, if a mine operator wishes to contest the amount of a proposed penalty as well as the fact of the underlying violation, it [sic] must seek review under Section 518, and prepayment of the penalty into escrow is a precondition of that review.

CONCLUSION

The District Court's decision was correct in all respects and, accordingly, should be affirmed.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General
THOMAS A. DEMING
Assistant Attorney General
MICHAEL J. SCIBINICO, II
Assistant Attorney General
Department of Natural Resources
Tawes State Office Building
Annapolis, Maryland 21401
(301) 269-2251

JANUARY 1981

APPENDIX A

Offices of
THE ATTORNEY GENERAL
Room 104
Legislative Services Building
90 State Circle
Annapolis, Maryland 21401
301-269-3786

May 21, 1980

Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21404

Re: Senate Bill 975

Dear Governor Hughes:

We have reviewed Senate Bill 975 for constitutionality and legal sufficiency and, although we have no objection to the bill becoming law, we must point out a serious constitutional question raised by one of its provisions.

Senate Bill 975, among other things, attempts to conform Maryland's strip mining laws to the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328. In so doing, the bill amends § 7-517(b)(4) of the Natural Resources Article to provide for a civil penalty scheme patterned after 30 U.S.C. § 1268(c). In essence, this amendment provides that a person adversely affected by a proposed civil penalty assessment imposed after the issuance of cease and desist order or notice of noncompliance may request an adjudicatory hearing on the questions before the Department of Natural Resources. However, "at the time of the request the full amount of the penalty must be paid over to the Secretary for placement in an escrow account pending completion of administrative

and judicial review of the assessment." § 7-517(b)(4). In addition, this provision states:

> Failure to forward the full amount to the Secretary within 30 days of an assessment order shall result in a waiver of all legal rights to contest the amount of the penalty or the underlying violation. If it is eventually determined that no violation occurred, or the amount of the penalty is reduced, the Secretary shall remit within 30 days the appropriate amount to the person, with interest at the rate of 6 percent.

In our view, this penalty prepayment provision may offend due process in violation of the Fourteenth Amendment of the United States Constitution. Substantial penalties, which may exceed $5,000 per day for each violation, can be imposed on a suspected violator before he can contest either the violation or the amount of the penalty. Moreover, in our view, such a deprivation of property is not remedied by the fact that the money is placed in escrow and may be returned in the future with interest. Although such a scheme may very well deter violation of the strip mining laws, it also may force settlement and deter appeals regardless of the merits. In addition, it would appear to strike hardest at the less wealthy operators. The federal penalty provision, along with other features of the federal act, are the subject of constitutional challenge in *Virginia Surface Mining and Reclamation Assoc., Inc. v. Anderson*, ___ F. Supp. ___, No. 78-0224-B (N.D. Va., Jan. 3, 1980), jurisdictional statement filed ___ U.S. ___, No. 79-1596 (April 11, 1980)[1] and *Star Coal v. Anderson*, ___ F. Supp. ___, No. 79-1712 (S.D. Iowa, preliminary injunction issued Feb. 13, 1980).

The Department of Natural Resources has been advised that all states must duplicate the penalty prepayment

[1] Also, at issue in that case is the constitutionality of absolute restrictions on mining within certain distances of public and private places and of absolute requirements that all violations be corrected within 90 days. Because S.B. 975 adds these provisions to State law, but with some moderating features, we do not believe they are facially unconstitutional.

provision in their laws to obtain federal approval of their strip mining enforcement program. If Maryland's program does not contain this feature, it may be disqualified, with the result being that the federal government will enforce federal law in Maryland, including the prepayment penalty scheme. For these reasons, we urge that the bill be signed so that these provisions will be enforced by State officials sensitive to the constitutional questions raised by the legislation.

Very truly yours,

Stephen H. Sachs
Attorney General

SHS:RAZ:ss
cc: Honorable Fred L. Wineland
Judson P. Garrett, Jr., Esq.
F. Carvel Payne
Honorable Harry J. McGuirk

No. 80-231

IN THE

SUPREME COURT OF THE UNITED STATES

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF MID-AMERICA LEGAL FOUNDATION SUPPORTING THE POSITION OF APPELLEES

JOHN M. CANNON
Counsel for Amicus Curiae

MID-AMERICA LEGAL FOUNDATION
Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606

Pandick Press Midwest, Inc., Chicago • 454-7600

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BRIEF OF MID-AMERICA LEGAL FOUNDATION SUPPORTING THE POSITION OF APPELLEES

INTEREST OF AMICUS

This brief is submitted as *amicus curiae* on behalf of Mid-America Legal Foundation ("Mid-America"). The written consents of all parties are filed with the Clerk of the Court.

Mid-America, based upon its expertise and purpose, has an interest in the disposition of this case. Mid-America was organized in 1975 as an Illinois not-for-profit corporation to

engage in study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the "original contour" and "prime farmland" provisions of the Surface Mining Control and Reclamation Act of 1977 [hereinafter the "Act"], 30 U.S.C. §§ 1265, 1268 and 1269, are not plainly adapted to regulating commerce among the states. Neither the parties nor the other *amici* have focused on this argument. Thus, it is in the interest of the Court to consider this approach to the case.

Mid-America supports a strong legislative effort to require land preservation and reclamation. However, Congress cannot employ irrational means to achieve a legitimate end. Since there are rational means of equalizing competition among coal producers variously affected by state reclamation requirements and of achieving the ultimate aesthetic goal of land reclamation, the judgment of the district court should be affirmed.[1]

---

[1] *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, Docket Nos. 79-1538 and 79-1596, on appeals from the Western District of Virginia have been consolidated with the Indiana decision which is the focus of this brief. *Amicus* believes that the original contour aspect of the Virginia decision should be affirmed for essentially the same reasons advanced herein.

SUMMARY OF ARGUMENT

While individual states can regulate surface mining reclamation because of its inherently local character, Congress may regulate the same activity only if such regulation is incidental to a valid regulation of commerce among the states. This Court has never held that simply because a commodity is traded in interstate commerce, any traditionally local activity related to that commodity is subject to federal regulation for any purpose. The prime farmland provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1269, is not a reasonable incident to congressional regulation of interstate commerce but is rather the end in itself.

Although Congress could act under the Commerce Clause to equalize interstate competition in coal production, maintain national farmland productivity and prevent interstate pollution, the prime farmlands provision is not a rational means for the accomplishment of these objectives. The provision regulates only one of many inequalities generated by various state requirements, touches only one of many uses which may damage or eliminate farmland, and does not add any protection against interstate pollution which is not provided by other more comprehensive federal laws. Thus, imposition of the prime farmland provision on any state or local government exceeds congressional authority because it is not plainly adapted or necessary and proper to any valid exercise of the commerce power.

ARGUMENT

The 1977 Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (hereinafter the "Act"), requires, *inter alia,* that surface mined prime farmland be returned to prime farmland condition, § 1269. The Act also requires that surface mined land be returned to approximate original contour, § 1265, and that the productivity of any surface mined land equal its pre-mining productivity as measured by its pre-mining use, § 1268. The Act imposes the same requirements on all coal producers in all states despite substantially different local conditions. Although the Act imposes substantial economic burdens by requiring the return of farmland to its pre-mining condition, the Act does not require that the land be used for its pre-mining purpose or maintained in that condition.

The power of Congress to regulate the aesthetics of local scenery in the context of the legislation here at issue can be derived only from the Commerce Clause and the related provisions of the Necessary and Proper Clause. Clearly, taxing and spending powers are not at issue. Also not involved are interstate highways, interstate air or water quality or even coal intended for shipment in interstate commerce.

1. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress under the Commerce Clause Because it Regulates Particularly Local Aspects of Interstate Activity Without Regulating Any Related Interstate Activity.

Although individual states can regulate surface mining reclamation because of its inherently local character, Congress is without power to regulate local activities "which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general power of government." *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 195 (1824); *Katzenbach* v. *McClung,* 379 U.S. 294, 302 (1964). "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance* v. *NLRB,* 322 U.S. 643, 650 (1944).

Appellants apply simplistic scholastic reasoning by arguing that because coal is traded in interstate commerce, Congress may regulate any condition under which it is produced. Brief for Appellants at 11-12. This Court has never held that Congress may regulate particularly local aspects of interstate commerce without also regulating a concomitant general interstate commercial activity or at least requiring that the local activity be conducted in the production of articles intended for interstate shipment. *United States* v. *Darby,* 312 U.S. 100, 117-118 (1941).

In *Darby* this Court upheld a provision of the Fair Labor Standards Act of 1938 which fixed the minimum wages and maximum hours for employees engaged in the production of goods intended for interstate commerce. This Court concluded that the statute was both a valid exercise of the commerce power and consistent with the Fifth and Tenth Amendments. *Id.* at 111. The power to regulate wages in *Darby* was incidental to and flowed from the power to regulate commerce among the several states.

Darby can be readily distinguished from the instant case. Here Congress chose to regulate land use aesthetics an end in itself. Such aesthetics traditionally have been matters of local concern. Their regulation in the prime farmland provision of the Act is neither incidental to a valid exercise of the commerce power nor related to a general interstate commercial activity. *See Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Several cases involving the Commerce Clause are useful in an analysis of the question here at issue. In *Perez* v. *United States*, 402 U.S. 146 (1971), this Court upheld the federal conviction of a local loan shark because of the relationship between loan sharking on a local level and interstate crime. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), this Court upheld application of federal civil rights laws to local public accommodations where Congress prohibited discrimination in all public accomodations affecting commerce among the states. And finally, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court upheld the application of federal wheat production regulations to a small farm which sowed only twenty-three acres for its own use because the law as a whole regulated the national wheat market. In all three cases, this Court sustained congressional regulation of intrastate activity which was related to a larger interstate scheme.

An entirely different question concerning the scope of the commerce power would have been raised in these cases if Congress had prohibited only local loan sharking or discrimination only in those accommodations which had the least effect on interstate commerce, or had regulated only farms which raised fewer than twenty-five acres of wheat and consumed their own production. Yet this is precisely the type of situation presented to this Court by the instant case, since the prime farmlands provision of the Act regulates a local activity without regulating any broader interstate commerce.

A brief examination of the two major justifications for the prime farmlands provision demonstrates that the Act regulates only intrastate aspects of coal mining. The primary justification is equalization of interstate competition among coal companies

by imposition of the same burdens on all coal producers in all states. *See* 30 U.S.C. § 1201(g) (Supp. 1979); Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect,* 81 W.VA.L.REV. 553 (1979). However, the Act is not designed to equalize all, many, or even the most substantial, of the various burdens imposed by different state and local governments or natural conditions. The Act does not deal with the varying costs of producing anthracite or bituminous coal, or of marketing high-sulfur or low-sulfur coal, or of mining coal which is found close to the surface or buried many meters below. Instead, the Act is designed to affect only a single aspect of surface mining, namely, the burdens of reclamation imposed by some states. The effect of the Act on local governmental concerns is not incidental to any comprehensive federal market regulation. The effect on the aesthetics of local scenery is itself the end.

Neither can the prime farmlands provision be justified as a national farmland preservation act. *See* Brief for Appellants at 12-16. The Act does not prohibit any damage to prime farmlands by any use other than surface mining. If, either before mining or after reclamation, the land owner decides to build a business, a church or even a massage parlor, then federal law will not stop him. Mid-America does not maintain that Congress could not pass a comprehensive prime farmlands preservation act, but Congress has not elected to do so. The prime farmlands provision, lacking any relation to interstate commerce, must fall as an invalid regulation of local activity.[2] *Perez, Heart of Atlanta* and *Wickard* are inapposite.

---

[2] Appellees also argue that the act regulates interstate commerce in coal by prohibiting that commerce if it comes at the expense of either the environment or the public safety. Brief for Appellants at 12. The public safety argument refers primarily to provisions of the Act not addressed here but concerning the areas containing highways or buildings that are designated as unsuitable for mining. Brief for Appellants at 34-36. The district court found the environmental argument unsupported by the evidence, especially since any potential pollution problems were covered by other provisions of federal law. Brief for Appellants at 16-18.

Because of the economic and aesthetic ramifications of surface mining reclamation, any state's regulatory policy in this area must be the result of conscious and deliberate consideration of particularly local factors. Federal intrusion into such a local concern has no constitutional basis. Mid-America is not raising the Tenth Amendment argument that the regulation directly affects essential and traditional state governmental functions. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). For this brief, it is clear that the "amendment states but a truism that all is retained which has not been surrendered." *United States* v. *Darby,* 312 U.S. 100, 124 (1941). Under the Constitution, the states simply have not surrendered to the federal government the power to regulate intrastate activities except to the extent such regulation is incidental to a valid exercise of an enumerated power.

2. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress under the Commerce Clause Because it is Not Plainly Adapted to Regulating Commerce Among the States.

The district court ruled that the prime farmlands provision is directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. It further held that the regulation is not a rational means of achieving the legitimate end of removing any substantial adverse effect on interstate commerce. *Indiana* v. *Andrus,* No. 78-500 (S.D. Ind. June 10, 1980) at 14-15.

Every act of Congress must be based on a necessary and proper exercise of some constitutional power. In *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 430 (1819), Chief Justice Marshall delineated the standard of the Necessary and Proper Clause: "[l]et the end be legitimate, let it be within the scope of the Constitution, and all means . . . , which are plainly adapted to that end [and] which are not prohibited . . . , are constitutional." The words "not prohibited" refer to specific limitations on the enumerated powers, such as the Tenth Amendment's limitation on the exercise of the commerce power.

National League of Cities v. *Usery,* 426 U.S. 833, 842-43 (1976). The words "plainly adapted" incorporate into every exercise of constitutional power a rational basis test: the means chosen to exercise the power must have a rational or reasonable relation to "the end permitted by the Constitution." *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 262 (1964); *National League of Cities* v. *Usery,* 426 U.S. 833, 840 (1976); *Indiana* v. *Andrus,* No. 78-500 (S.D. Ind. June 10, 1980) at 9-10.

Congress may select any reasonable and rational means necessary to regulate commerce among the several states. The appellees and other supporting *amici* are presenting Tenth Amendment and Due Process arguments which need not be restated here. Mid-America argues that the prime farmlands provision is not rational as a regulation of commerce, that is, not plainly adapted to equalizing the costs of coal production, maintaining farmland productivity, or preventing pollution. It affects one of many variable costs of coal production in different localities. It simply is not rational to handicap Indiana coal producers and state legislative power over land use in order to equalize the economic handicap imposed on producers by other states which do not have prime farmland covering virtually all mineable coal.

The prime farmlands provision also does not rationally conserve farmland, since it only requires reclamation. The Act as a whole is not concerned with "the actual use to which an owner may choose to put the land immediately following reclamation." Brief for Appellants at 23. The reclamation required by the prime farmlands provision is especially unnecessary where there is little demand for prime farmland or where there is no reasonable prospect of farming as the post-mining use. Congress apparently is concerned about the appearance of the land, but not about its actual potential for productivity. Furthermore, it is not rational to require farm productivity where the federal government is paying Indiana farmers not to grow crops on many times more acres each year than would be surface mined in twenty years.

Finally, the prime farmlands provision cannot be transformed into rational legislation by asserting that it protects the environment. Where the environmental aspect involved is already protected more comprehensively by other provisions of federal law, another burdensome regulation which does not add any other protection against interstate pollution cannot be characterized as plainly adapted to protect the environment. The prime farmlands provision is therefore not a rational regulation of commerce among the states. Congress does not have power to impose unreasonable or irrational laws. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819).

There are rational means by which Congress can equalize competition, conserve farmland, prevent pollution and even achieve the ultimate goal of aesthetic local scenery. Congress could, for example, tax the production of all coal and spend the money thereby collected to encourage a return to original contour and prime farmland. Such inducement could achieve the ultimate aesthetic goals without imposing oppressive burdens. *Cf. Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F.Supp. 425, 432-33 (1980) (coercion-inducement distinction in Tenth Amendment context). But Congress cannot, under any power, irrationally coerce such reclamation.

CONCLUSION

For the foregoing reasons, the judgments of the Southern District of Indiana and the Western District of Virginia should be affirmed.

Respectfully submitted,

JOHN M. CANNON
Attorney for Mid-America
Legal Foundation,
*Amicus Curiae**

MID-AMERICA LEGAL FOUNDATION
Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

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* We wish to acknowledge the assistance of William H. Link and Richard F. Miranti, law students at The John Marshall Law School.